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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 42

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
PETITIONER,

vs.

LOUIS A. GREEN AND ROBERT HEILBRUNN, KNOWN IN THESE PROCEEDINGS AS THE GREEN COMMITTEE AND MORRIS GREEN

No. 43

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
PETITIONER,

vs.

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, ET AL.

No. 44

VANHORN BONDHOLDERS PROTECTIVE COMMITTEE,
PETITIONER,

vs.

LOUIS A. GREEN AND ROBERT HEILBRUNN, KNOWN IN THESE PROCEEDINGS AS THE GREEN COMMITTEE AND MORRIS GREEN

No. 45

VANHORN BONDHOLDERS PROTECTIVE COMMITTEE,
PETITIONER,

vs.

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI IN No. 42-43—FILED FEBRUARY 14, 1946.
PETITION FOR CERTIORARI IN No. 44-45—FILED FEBRUARY 15, 1946.

CERTIORARI GRANTED—MARCH 25, 1946.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

No. 9845

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

PETITION—Filed October 25, 1935

To The Honorable H. Church Ford, Judge Of The United States District Court:

The petition of Robert C. Adams, William P. Phillips and Clyde L. Paul, as Debenture Holders Protective Committee (and not individually), acting under Deposit Agreement dated as of December 9, 1930, between said Committee, Holders of Kentucky Fuel Gas Corporation Ten-Year Convertible 6½% Sinking Fund Gold Debentures, dated as of June 1, 1928, and others, and Edward S. Lewis and Howard J. Lynch respectfully represents upon information and belief that:

1. The Debtor is a corporation organized and existing under the laws of the State of Delaware, and is duly qualified to transact business in the Eastern District of Kentucky.

2. The Debtor is a business corporation engaged in the business of producing and marketing oil and natural gas in the State of Kentucky, is not a public utility, and is not a person chiefly engaged in farming or the tilling of the soil, and is not a municipal, railroad, insurance or banking corporation nor a building and loan association; but is a corporation that could become a bankrupt under Section 4 of the Bankruptcy Act.

3. During the six months next preceding the filing of this petition, the Debtor has had its business, its principal [fol. 2] place of business and its principal assets within the territorial jurisdiction of the Eastern District of Kentucky.

4. The assets of the Debtor consist principally of numerous parcels of valuable gas and oil producing real

estate, leases and leasehold interests for oil and gas purposes, and wells, pipe-lines, franchises, right of way, materials, supplies and equipment used and useful in its business. The following is a brief description of the assets of the Debtor as according to the balance sheet of September 30, 1935:

Fixed Capital	$6,603,261.50
Investments in Affiliated Companies	392,919.60
Reacquired Securities	250,000.00
Current and Working Assets	191,984.00
Sinking Fund Deposits—Cash	9,100.00
Deferred Charges and Suspense Accounts	680,385.56
Total Assets	$8,127,650.66

5. The following is a brief description of the liabilities (including capital stock) of the Debtor as according to the balance sheet of Septembere 30, 1935:

Capital Stock		$2,944,550.00
Funded Debt		4,944,706.59
Current and Accrued Liabilities		16,403,18
Claims of Creditors Prior to Receivership (Excluding Funded Debt)		429,693.93
Reserves		435,203.82
Surplus:		
Capital	$219,904.36	
Earned	862,811.22	
		642,906.86
Total Liabilities		$8,127,650.66

(Include no provision for interest or Amortization of Funded Debt Discount and Expense subsequent to December 2, 1930.)

[fol. 3] 6. The authorized capital stock of the Debtor consists of 750,000 shares of no par common stock, of which 453,000 shares are not outstanding.

7. The Debtor defaulted on December 1, 1930, in the payment of interest then due on its First Mortgage 6½% Sinking Fund Gold Bonds, Series A, due June 1, 1942, and

its Ten-Year Convertible 6½% Sinking Fund Gold Debentures, due June 1, 1938. On all of the aforesaid liabilities no interest has been paid since said default.

8. The Debtor is unable to meet its debts as they mature, and by reason of such facts is in need for relief under section 77B of the Bankruptcy Act as amended.

9. In an action entitled "The American Rolling Mill Company v. Kentucky Fuel Gas Corporation, in Equity No. 1340," W. W. Lockhart was by order of this Court appointed Receiver of the property of the Debtor on December 2, 1930. Said proceeding is still pending in this Court undetermined. On April 15, 1931, the Chatham Phenix Bank & Trust Company (since merged by Manufacturers Trust Company), filed in this Court foreclosure proceedings alleging default in payment of First Mortgage. The Bank listed a First Mortgage of $4,000,000. against the Debtor, dated June 1, 1928. A petition by a minority stockholder of the Debtor to intervene in receivership proceedings was denied, and an appeal taken to the Circuit Court of Appeals where it is still pending undetermined.

10. Your petitioners are creditors of the Debtor, having provable claims against the Debtor, which amount in the aggregate, in excess of the value of the securities held by them, if any, to more than $1,000; the nature and amount of your petitioners' claims are as follows:

(1) Petitioners Robert C. Adams, William P. Philips and Clyde L. Paul, as Debenture Holders Protective Committee (and not individually), acting under Deposit Agreement dated as of December 9, 1930, are the owners and holders of $616,000.00 principal amount of Ten Year Convertible 6½% Sinking Fund Gold Debentures, dated as of June 1, 1928, of the Debtor.

(2) Petitioner Edward S. Lewis is the owner and holder of $1,000.00 principal amount of Ten-Year Convertible [fol. 4] 6½% Sinking Fund Gold Debentures, dated as of June 1, 1928, of the Debtor.

(3) Petitioner Howard J. Lynch is the owner and holder of $1,000.00 principal amount of Ten-Year Convertible 6½% Sinking Fund Gold Debentures, dated as of June 1, 1928, of the Debtor.

11. The Debtor has filed no petition nor answer under Section 77B of the Bankruptcy Act in this Court nor in any other Court having jurisdiction thereunder.

12. Your petitioners propose that the Debtor shall affect a reorganization pursuant to the provision of section 77B of the Bankruptcy Act, as amended.

Wherefore, your petitioners pray for an order approving this petition as properly filed under section 77B of the Bankruptcy Act, and staying suits against the Debtor or its property, and for such other and further relief as to the Judge may seem proper under said section 77B.

Robert C. Adams, William P. Philips and Clyde L. Paul, as Debenture Holders' Protective Committee (and not individually), acting under Deposit Agreement dated as of December 9, 1930, between said Committee, Holders of Kentucky Fuel Gas Corporation Ten-Year Convertible 6½% Sinking Fund Gold Debentures, dated as of June 1, 1928, and others, and Edward S. Lewis and Howard J. Lynch, Petitioners. Martin & Smith, Attorneys for Petitioners. Miller, Owen, Otis & Bailly, Attorneys for Robert C. Adams, William P. Phelps and Clyde L. Paul, as Debenture Holders Protective Committee.

[fol. 5] *Duly sworn to by George B. Martin. Jurat omitted in printing.*

[fol. 6] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

No. 1217

JOHN L. LILIENTHAL, and ROBERT NEWHALL, as a Protective Committee (and not individually), acting under a Deposit Agreement dated December 17, 1930 between said Committee and Holders of American Fuel and Power Company Five Year Secured 7% Convertible Gold Notes due July 1, 1934, Henry W. Gould and Paul C. Newell, Petitioners,

against

AMERICAN FUEL AND POWER COMPANY, Defendant

CREDITORS' PETITION FOR REORGANIZATION OF A CORPORATION UNDER SECTION 77B OF THE BANKRUPTCY ACT—Filed at Lexington, Ky., April 29, 1940—No. 115.

To the Honorable the Judge of the District Court of the United States for the District of Delaware:

Your petitioners respectfully show:

1. Upon information and belief the above-named American Fuel and Power Company (hereinafter referred to as the "Debtor") is a corporation incorporated under the laws of a state within the territorial jurisdiction of this Court, to wit: the State of Delaware.

2. Upon information and belief, the Debtor is not a municipal, railroad, insurance or banking corporation, or a building and loan association and could become a bankrupt under Section 4 of an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United [fol. 7] States" approved July 1, 1898 as amended (herein referred to as the "Bankruptcy Act").

3. Upon information and belief, the Debtor is a holding corporation owning the stock and other securities of subsidiary corporations engaged in the business of producing and distributing natural gas.

4 Upon information and belief on March 21, 1934 the Court of Chancery in and for New Castle County, State of Delaware, appointed William H. Heald, Esq., of Wilming-

ton, Delaware, as Receiver for the Debtor, and such receivership is still pending.

5. Upon information and belief:

On or about July 31, 1929 the Debtor, being thereunto duly authorized, issued and delivered in the City of New York, State of New York, to Chatham Phenix National Bank and Trust Company, as Trustee, a Trust Agreement dated as of July 1, 1929, authorizing the issuance of Four million dollars ($4,000,000) principal amount of its Five Year Secured 7% Convertible Gold Notes, due July 1, 1934 and pledged as collateral security under said Trust Agreement the capital stock of various of the Debtor's subsidiary corporations. Pursuant to said Trust Agreement, the Debtor duly issued Two million dollars ($2,000,000) principal amount of said Notes, of which One million nine hundred sixty-five thousand one hundred dollars ($1,965,100) principal amount are now outstanding in the hands of bona fide holders for value.

On January 1, 1931 the Debtor defaulted in the payment of interest on said outstanding Notes and pursuant to the terms of said Trust Agreement, Manufacturers Trust Company, as Successor Trustee, thereupon declared all of said One Million nine hundred sixty-five thousand one hundred dollars ($1,965,100) principal amount of issued and outstanding Notes to be immediately due and payable. No payment on account of principal or interest have been made on said Notes since July 1, 1930.

On or about January 17, 1935 a suit was instituted in the United States District Court for the Southern District of New York by said Successor Trustee against the Debtor, said Receiver and Columbia Gas & Electric Company, for [fol. 8] the foreclosure of the lien of the aforesaid Trust Agreement and said suit is still pending.

6. Upon information and belief, the value of the collateral held by said Successor Trustee under said Trust Agreement does not exceed One Million two hundred thousand dollars ($1,200,000).

7. Upon information and belief the Debtor is insolvent or unable to meet its debts as they mature.

8. Your petitioners are creditors of the Debtor, having provable claims against the Debtor which amount in the

aggregate, in excess of the value of securities held by them, to One thousand dollars ($1,000) or more. Your petitioners John L. Lilienthal and Roger Newhall, as a Protective Committee (and not individually) acting under Deposit Agreement dated December 17, 1930 are the owners and holders of $1,754,100 principal amount of said Five Year Secured 7% Convertible Gold Notes due July 1, 1934 of the Debtor. Each of your petitioners Henry W. Gould and Paul C. Newell is the owner of One thousand dollars ($1,000) principal amount of said Five Year Secured 7% Convertible Gold Notes due July 1, 1934 of the Debtor.

9. Upon information and belief the Debtor has not filed in this or any other Court, a petition or answer under Section 77B of the Bankruptcy Act.

10. The petitioners, as such creditors, propose that the Debtor shall effect a reorganization under and pursuant to Section 77B of the Bankruptcy Act.

11. Upon information and belief Exhibit "A" hereto attached is a statement of the assets, liabilities, capital stock and financial condition of the Debtor. Said Exhibit "A" is hereby made a part hereof to the same extent as if fully set forth herein.

12. Upon information and belief, the facts showing the need for relief under said Section 77B are that the assets of the debtor are of substantial value and have, when administered as part of a going concern, an earning power that should be preserved by proceedings for reorganization of the Debtor under Section 77B of the Bankruptcy Act for the benefit of creditors, the Debtor and other interested parties, whereas, if the assets are liquidated, as will be [fol. 9] necessary if the lien of said Trust Agreement is foreclosed, their value would be greatly diminished.

13. Upon information and belief, the business of the Debtor may be operated to best advantage under the provisions of Section 77B of the Bankruptcy Act by a trustee or trustees appointed thereunder.

Wherefore, your petitioners pray that an order be entered approving this petition as properly filed under Section 77B of the Bankruptcy Act; that this Court appoint a trustee or trustees of the Debtor's estate of whatever char-

acter and wherever situated, and that your petitioners be granted such other, further and different relief as to this Court may seem just, lawful and proper.

Dated: December 6th, 1935.

°John L. Lilienthal, and Roger Newhall, as a Protective Committee (and not individually), acting under a Deposit Agreement dated December 17, 1930 between said Committee and Holders of American Fuel and Power Company 7% Convertible Gold Notes due July 1, 1935, Henry W. Gould, Paul C. Newall, by (Sgd.) Benjamin N. Brown, Attorney for Petitioners.

Duly sworn to by Benjamin N. Brown. Jurat omitted in printing.

[fol. 10] EXHIBIT "A"

American Fuel and Power Company

Assets

Investments Subsidiary Companies		$1,835,961.53
Cash		1,618.26
Notes Receivable—Inter Company		25,000.00
Loans Receivable—Inter Company		1,103,862.66
Interest Receivable—Inter Company		29,870.40
		$2,996,312.79

Liabilities

Funded Debt:		
Five Year Secured 7% Convertible Gold Notes, due July 1, 1934	$2,000,000.00	
Less: Conversions into Class "A" stock	34,900.00	
		$1,965,100.00
Current Liabilities:		
Accounts Payable	$17,301.66	
Notes Payable	552,000.00	
Matured Interest Unpaid	765,054.64	
Accrued Taxes	27,415.02	
		1,361,771.32
Inter Company:		
Accounts Payable	$2,799.76	
Loans Payable	60,410.97	
		63,210.73
Capital Stock:		
Class "A," No Par, 1,570½ shares Issued	$7,852.50	
Common, No Par, 1,898,912 shares issued	550,050.01	
		557,902.51
Surplus:		
Capital	$27,047.50	
Earned	978,719.27	
		951,671.77
		$2,996,312.79

[fol. 11] December 6, 1935. Let the writs prescribed by the Supreme Court issue, returnable within ten days after the service of a copy of the petition filed herein upon said debtor.

(Sgd.) John P. Nields.
J.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY. AT LEXINGTON

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtors

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

RESPONSE OF LOUIS A. GREEN AND ROBERT HEILBRUNN, ACTING AS AN INDEPENDENT COMMITTEE FOR THE AMERICAN FUEL AND POWER COMPANY NOTEHOLDERS, AND OF MORRIS GREEN, A CREDITOR IN THE INLAND GAS AND KENTUCKY FUEL, GAS PROCEEDINGS—Filed January 1, 1944

To the Hon. H. Church Ford, Judge of the United States District Court for the Eastern District of Kentucky:

Pursuant to order of this Court dated December 3, 1943, the above, for their response to the application of the Van [fol. 12] Horn Committee for distribution to the Inland Gas Corporation first mortgage bondholders, state:

I. That the Green Committee above mentioned represents owners and holders of notes and some owners and holders of certificates of deposit issued by the Lilienthal Committee for the American Fuel & Power Company notes; and that Morris Green is the owner and holder of first mortgage and debenture obligations of Inland Gas Corporation and Kentucky Fuel Gas Corporation.

II. That they oppose and object to any further distribution to Inland Gas first mortgage bondholders until cer-

tain questions and issues herein recited are determined by this Court.

III. That there be a determination of the extent and value of the security under the indenture, pursuant to which the first mortgage bonds of the Inland Gas Corporation were issued in order that appropriate conclusions may be arrived at as to the deficiency, if any, representing a general claim against the estate and assets of Inland Gas in favor of first mortgage bondholders.

IV. Respondents assert that the value of the claims of Columbia Gas & Electric Corporation rejected by the judgment of this Court entered October 30th, 1943 and that the portion of the debtor Inland's property securing said first mortgage bonds' claim enures to the benefit of the general assets and estate of the debtors; and that the assets remaining as security for the first mortgage bonds of Inland Gas Corporation were and are insufficient to meet their claims in full with interest and that the free assets of Inland Gas Corporation are inadequate to satisfy the deficiency of said Inland Gas Corporation first mortgage bonds and all other claims secured or otherwise with interest; and that no allowance should be made to the creditors of Inland Gas Corporation for interest subsequent either to the date of the equity receivership, to-wit: December 2, 1930, or the date of the filing of the petition in bankruptcy, to-wit: October 15, 1935.

V. (A) That heretofore and in or about the year 1939, Ben Williamson, Jr., as trustee of Inland Gas Corporation, acquired from Ben Williamson, Jr. as trustee of Kentucky [fol. 13] Fuel Gas Corporation the physical assets and property of Kentucky Fuel Gas Corporation at a purchase price of $157,000.

That the purchase price for such Kentucky Fuel Gas Corporation's physical assets and property was paid to Ben Williamson, Jr. as trustee of such Kentucky Fuel Gas Corporation and such physical assets and property of Kentucky Fuel Gas Corporation were transferred and conveyed to Ben Williamson, Jr. as trustee of Inland Gas Corporation, which has owned and held such assets and property since such purchase.

That the estate of the debtor Inland Gas Corporation has produced and sold, from the assets and property of Kentucky Fuel Gas Corporation, thus acquired, substantial

quantities of natural gas, and had earned substantial sums of money from such production and sale. The amounts and values of such gas and earnings are not known to respondents but are peculiarly within the knowledge of said Ben Williamson, Jr. as trustee of Inland Gas Corporation.

That such physical assets and property heretofore owned by Kentucky Fuel Gas Corporation are not subject to the lien of, and do not serve as security to, the holders of Inland Gas Corporation first mortgage bonds, nor do the earnings derived from such Kentucky Gas physical assets and property come within the lien of said first mortgage.

(B) That no property acquired by Inland Gas Corporation or any receiver or trustee thereof, after the execution and delivery on or about March 15, 1928 of the Inland Gas Corporation first mortgage indenture is covered by the lien of the said mortgage, and that such property is part of the general assets of the estate of said Inland Gas Corporation available to all creditor claimants.

VI. That the lien of the mortgage indenture made by Inland Gas Corporation does not extend to the revenues or earnings accruing out of the production and sale of natural gas by Inland Gas Corporation after December 2, 1930, the date of equity receivership or a general creditor's bill, or after the date of the filing of the petition in bankruptcy on or about October 15, 1935.

[fol. 14] VII. That for an equitable and appropriate determination as to whether or not a distribution should be made to the holders and owners of Inland Gas first mortgage bonds, there must be an adjudication as to the amount due the debtor American Fuel & Power Company and its subsidiary, Carbreath Gas Company, from Inland Gas Corporation upon the general claims filed against the latter by said companies.

VIII. There exist valid claims whose amount should be determined before distribution be made, in favor of Inland Gas Distributing Company and Carbreath Gas Company arising during the course of these bankruptcy proceedings and prior thereto out of unreasonable and inequitable prices paid by Inland Gas Corporation to said Carbreath Gas Company for the latter's natural gas, and out of the prices at which natural gas was sold by Inland Gas Corporation to Inland Gas Distributing Company re-

sulting in the loss of substantial sums of money to Inland Gas Distributing Company and Carbreath Gas Company. To the extent of such losses assets have been syphoned out of the Carbreath Gas Company and Inland Gas Distributing Company in favor of Inland Gas Corporation which inequitably and unjustly reaped profits by virtue of such transaction.

IX. Respondents join with the trustee in issues raised by trustee urging this Court to determine, before directing any further distribution to Inland Gas Corporation first mortgage bondholders, the issues raised by the trustee in his answer, although respondents do not concur in the trustees' conclusions with respect to same, if not all, of such issues raised by him.

Wherefore, these respondents pray that no order of distribution be entered herein until all of the questions and issues presented herein and presented by the Trustee be finally determined and adjudicated by the Court.

Baker, Obermeier, Rosner & Rosenson, by Oscar S. Rosner, Attorneys for the Green Committee and Morris Green.

[fol. 15] *Duly sworn to by Louis A. Green and Morris Green. Jurat omitted in printing.*

[fol. 16] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY. AT LEXINGTON

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtor

In Bankruptcy No. 989-B

In the Matter of Inland Gas Corporation, Debtor

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

Transcript of Proceedings—Filed May 6, 1944

Transcript of proceedings had at Lexington, Kentucky beginning on Tuesday, April 11, 1944, at 10:00 A. M. in the United States District Court for the Eastern District of

Kentucky, before His Honor, H. Church Ford, upon notice by the Trustee in Bankruptcy of the Inland Gas Corporation, Ben Williamson, Jr., given to all the interested parties regarding the response of said Trustee and his Petition for advice filed November 13, 1943, requesting the determination of certain questions before a distribution of funds in the hands of said Trustee to first mortgage bondholders be approved.

APPEARANCES:

Richard B. Hand, of 111 Broadway, New York, New York; Senator Robert J. Bulkley, of Cleveland, Ohio; W. E. Darragh, of Lexington, Kentucky, for the Van Horn Committee.

Homer W. Bowers, of Charleston, West Virginia, representing Carl Early and other debenture holders who have filed responses in the Inland case.

[fol. 17] Ben L. Kessinger, Assistant United States Attorney for the Eastern District of Kentucky, Lexington, Kentucky, appearing on certain tax matters only.

C. J. Odenweller, Jr., for the Securities & Exchange Commission, Regional Office, 1370 Ontario Street, Cleveland, Ohio.

Clifford E. Smith, of Frankfort, Kentucky, special counsel representing Ben Williamson, Jr., Trustee in Bankruptcy of Inland Gas Corporation and Kentucky Fuel Gas Corporation.

Arthur G. Logan, of Wilmington, Delaware, special counsel in a suit pending in Delaware for Ben Williamson, Jr., Trustee in Bankruptcy for the Inland Gas Corporation and Kentucky Fuel Gas Corporation.

Ben Williamson, Jr., of Ashland, Kentucky, Trustee in Bankruptcy of the Inland Gas Corporation and Kentucky Fuel Gas Corporation, present in person.

George W. Jaques, of Milbank, Tweed and Hope, 15 Broad Street, New York, New York; LeWright Browning, of Ashland, Kentucky, representing the Vanston Committee and personal bondholders.

George B. Martin and John L. Smith, of Martin & Smith, of Catlettsburg, Kentucky; Miss Mary N. MacDonagh, of Willkie, Owen, Otis, Farr & Gallagher, of 15 Broad Street, New York, New York, attorneys for the Paul Committee.

Thomas Dawson, representing Alfred Howell and others.

John L. Davis and Judge R. C. Stoll, of Stoll, Muir, Townsend, Park and Mohney, of Lexington, Kentucky, representing Clinton M. Harbison, Trustee in Bankruptcy of the American Fuel & Power Company.

Clinton M. Harbison, of Lexington, Kentucky, Trustee for the American Fuel & Power Company, present in person.

C. W. McConaughy, of Cadwalader, Wickersham & Taft, 14 Wall Street, New York, New York, representing the Lillienthal Committee for the American Fuel & Power Company.

[fols. 18-24] Harold C. Apisdorf, of Baker, Obermeier, Rosner & Rosenson, of 285 Madison Avenue, New York, New York, representing the Green Committee and Morris Green, a creditor.

Paul Williams, Special Assistant to the Attorney General, Anti-Trust Division, Department of Justice, Washington, D. C.

* * * * * * *

[fol. 25] Mr. Bowers: May it please, Your Honor, before proceeding with the trustee's request, I want to file objections to the exceptions of the classification of claims made by the trustee which was filed here.

The Court: All right. Shall we take this up now? I suppose you are all familiar with the petition. In order to familiarize myself, I will read it aloud.

[fol. 26] Response of Ben Williamson, Jr., Trustee of Inland Gas Corporation, to Application for Distribution, and Petition for Advice.

To the Honorable H. Church Ford, Judge of the District Court of the United States for the Eastern District of Kentucky:

Ben Williamson, Jr., Trustee of the Inland Gas Corporation, for his response to the Application for Distribution filed herein by the VanHorn Committee, states:

1. The Trustee is advised that many of the holders of the Inland Gas Corporation's First Mortgage Bonds desire that a distribution be made in accordance with the Application filed by the VanHorn Committee.

2. If such distribution safely and properly may be made, the Trustee favors the Distribution, in order

(a) To save further accumulation of interest, and

(b) To be relieved of the responsibility of holding a large amount of cash and securities now held by the Trustee which would have to be applied in making the distribution.

II

Ben Williamson, Jr., as Trustee of the Inland Gas Corporation, for his petition herein states that during the pendency of this proceeding, numerous questions have been raised by various interested parties; and that he believes said questions should be determined before the application filed by the VanHorn Committee is approved or authorized.

He states that he deems the following questions to be pertinent; and that said questions should be fully presented and finally determined, to-wit:

1. Are the First Mortgage Bondholders entitled to interest on interest, as provided in the Trust Indenture securing the First Mortgage Bonds?

2. Does the judgment of the District Court cancelling the claims of the Columbia Gas and Electric Corporation as holder of the First Mortgage Bonds and Debentures [fol. 27] result in taxable income within the scope, intent and meaning of the Federal Income Tax Laws? The indebtedness evidenced by said Bonds and Debentures having been valid, subsisting indebtedness of the Inland Gas Company at the time the Bonds and Debentures were issued, the judgment in effect cancelling that indebtedness evidenced by the Bonds and Debentures held by the Columbia Gas and Electric Corporation, and in effect discharging that portion of the Company's liability evidenced by the Bonds and Debentures held by the Columbia Gas and Electric Corporation without the Inland Gas Corporation paying out any cash in discharge of the obligation, is the basis of the question.

3. Since admittedly all of the outstanding First Mortgage Bonds and the Debentures were valid when issued, and each bondholder and debenture holder had as security for the payment of his bond or bonds and debenture or debentures his aliquot equity in the mortgaged property, and the subsequent acts of Columbia in acquiring bonds

and debentures which it acquired having resulted in a judgment declaring Columbia's bonds and debentures unenforceable, some of the debenture holders and general creditors have contended and may now contend that they should in effect be subrogated to the rights which Columbia Gas and Electric Company would have had as the owner of the bonds and debentures but for its violation of the Anti-Trust Laws, which resulted in the judgment aforesaid; and that the judgment holding Columbia Gas and Electric Company's claims unenforceable should not and cannot operate to increase the equity of the First Mortgage Bondholders. If the judgment of the Court denying Columbia Gas and Electric Company any recovery of its bonds, debentures and claims be treated as damages or as a penalty in the nature of damages, the contention of the debenture holders and the general claimants may be correct; and this question should be determined before the Application for Distribution is approved or authorized.

4. The Trustee is informed and believes that many of the present owners and holders of the First Mortgage Bonds and Debentures issued by Inland Gas Corporation purchased such Bonds and Debentures

[fol. 28] (a) Subsequent to the receivership of the Inland Gas Corporation; and

(b) Subsequent to the institution of this proceeding in bankruptcy.

The Trustee is further informed and believes that many of the present owners and holders of said First Mortgage Bonds and of said Debentures purchased the same at substantially less than the face amount of said Bonds and Debentures. It has been contended by some of the holders of the Bonds and Debentures, and may now be contended, that before any further distribution is made to the First Mortgage Bondholders, the holders of each of said Bonds should be required to prove when each Bond was acquired, the amount paid therefor; and that the Court should determine that it is not consistent with public policy that such holders should be allowed to participate in the distribution on the basis of full face value; and that the Court should limit any claim acquired by such person in con-

templation of or in the course of the proceedings under this Chapter to the actual consideration paid therefor by the holder.

The Trustee regards this question as pertinent and believes that it should be determined before the aforesaid Application for Distribution is approved or authorized.

5. Another question which has been raised and which the Trustee thinks should be determined is whether or not the net earnings from the sale of gas should be applied in full to the payment of the First Mortgage Bonds until those Bonds are paid in full; or whether or not the debenture holders and general creditors may have some interest in or claim to the participation of their claims in the distribution of such net earnings.

6. The Court should give due consideration to the probable effect the distribution applied for would have on the chance of ultimately working out of a sound and acceptable reorganization plan.

Ben Williamson, Jr., as Trustee of the Inland Gas Corporation, believes that the foregoing questions should be fully considered and determined; that the respective parties in interest should be required to present, by appro-
[fols. 29-47] priate pleadings, the aforesaid and any other claims or questions respecting their respective rights and interests; and that the foregoing and any other pertinent questions should be heard and fully determined before the Application for Distribution filed by the VanHorn Committee is approved or authorized.

Wherefore, Ben Williamson, Jr., as Trustee of the Inland Gas Corporation, prays that an order be entered herein;

1. Fixing the date for hearing on this petition;

2. Directing that all interested parties, on or before a date specified, should file appropriate pleadings asserting their respective claims, if any, with respect to the questions stated in the foregoing petition and any other claims which may be pertinent.

3. That an appropriate order be entered herein determining each of the questions presented in the foregoing

petition and determining the Trustee's rights and duties with respect thereto.

(Sgd.) Clifford E. Smith, Attorney for Ben Williamson, Jr. as Trustee for the Inland Gas Corporation and the Kentucky Fuel Gas Corporation.

The Court (Continuing): All right, gentlemen. I am ready to hear from any of the rest of you on this petition.

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[fol. 48] Mr. Apisdorf: Before the Court grants a recess, I would like to say that Mr. Rosner gave me some memoranda of law which were not filed in time with the Clerk [fols. 49-68] of the Court. I would like, if Your Honor please, to be given leave to file the original and give copies to all the parties:

The Court: All right.

Mr. Apisdorf (Continuing): I personally wrote the brief, and I think it would be helpful to the Court.

The Court: Does that have any bearing on the questions to be presented today?

Mr. Apisdorf: On the questions to be heard today or tomorrow or the next day, on the legal questions that ought to be tried out.

The Court: All right; I would be glad to have a copy. This is a supplemental brief on the question presented by the Trustee's Response, I understand.

Mr. Apisdorf: That is correct.

The Court: On the VanHorn Committee's petition for a distribution?

Mr. Apisdorf: Yes, sir.

The Court: Gentlemen, is it convenient to recess to 1:30; will that give you as much time as you want?

• • • • • • •

[fol. 69] Regarding the Report of Ben Williamson, Jr., Trustee of Inland Gas Corporation Relating to the Classification of Creditors and Stockholders; and Petition for Such Classification.

The Court: I call your attention to the report made by the Trustee, to which there have been some objections and exceptions filed in the Inland Gas case. This report reads:

"Report of Ben Williamson, Jr., Trustee of Inland Gas Corporation Relating to the Classification of

Creditors and Stockholders: and Petition for Such Classification.

Ben Williamson, Jr. Trustee of the Inland Gas Corporation, for the purpose of providing information [fol. 70] of record upon which the Court may act in fixing the division of the creditors and stockholders of the debtor into classes according to the nature of their respective claims and stock, reports that the claims which have been proven against the debtor, Inland Gas Corporation, will be properly payable out of the estate of the debtor, should, in the judgment of the Trustee, be classified as follows, to-wit:

Class I

Fees, allowances, and expenses that the Court may deem proper to the Trustee, Trustee's counsel, creditors' committees and their counsel and other attorneys or individuals who have rendered or who will hereafter render service in the reorganization proceedings and the proceedings prior to the reorganization; and any other costs, expenses, and allowances which may be authorized and approved by the Court under the provisions of sub-chapter 13, Chapter 10, Title 11, U. S. C. A., or other applicable laws.

Class II

Inland Gas Corporation First Mortgage 6½% Sinking Fund Gold Bonds, Series A, due February 1, 1938, issued under and pursuant to a mortgage or deed of trust dated as of February 1, 1928, between Inland Gas and Chatham Phenix National Bank and Trust Company and James F. McNamara, Trustees, wherein the Manufacturers Trust Company is now the successor corporate trustee, with February 1, 1931, and all subsequent coupons attached.

Of the above described bonds the Columbia Gas and Electric Corporation owns $1,596,600 principal face amount, less 25% or $399,150, which was impounded by Order of the United States District Court, Eastern District of Kentucky, and is held by the Trustee in a separate fund. On October 30, 1943, the United States District Court, Eastern District of Kentucky denied the enforcement of this claim.

[fol. 71] Class III

Inland Gas Corporation Ten Year 7% Sinking Fund Debentures, due February 1, 1938, issued under and pursuant to an indenture dated as of February 1, 1928, between the Inland Gas Corporation and the New York Trust Company as Trustee.

Inland Gas Corporation 6% Gold Notes, issued under and pursuant to the terms of a Trust Agreement dated as of January 2, 1930, between Inland Gas Corporation and Porter M. Gray, Trustee.

It is believed that the Debentures and Secured Notes are equally and ratably secured by a second mortgage dated January 2, 1930, made by the Inland Gas Corporation to the Ashland National Bank, Trustee.

Of the above described Debentures, the Columbia Gas and Electric Corporation owns $320,100 principal face amount. On October 30, 1943, the United States District Court, Eastern District of Kentucky, denied the enforcement of this claim.

Class IV

General Unsecured Creditors. Of these claims the Columbia Gas and Electric Corporation owns $252,313.21. On October 30, 1943, the United States District Court, Eastern District of Kentucky, denied the enforcement of this claim. (Omitted from Classification is the claim filed by the Carbreath Gas Corporation in the sum of $963,169.30 and the additional claim of that Company is the sum of $804,568.83, both of which claims have been objected to by the Inland Trustee.)

Class V

Stock Holders (No Par Common Stock).

Ben Williamson, Jr., as Trustee of the aforesaid debtor corporation, states that he believes the aforesaid division of creditors and stockholders into classes provides a proper division and classification according to the nature of the respective claims and [fol. 72] stock; and that all of the said claims and stocks should be so classified into the aforesaid respective classifications except such claims as may from time to time accrue or be or become payable for or on account of

Federal, State, and local taxes, Workmen's Compensation claims and any other like or similar claims all of which the Trustee believes should be treated as other necessary current operating expenses and should not be separately classified.

Ben Williamson, Jr., as Trustee of the Inland Gas Corporation, hereby requests that the Court fix a hearing, upon notice to the holders of secured claims, the debtor, the Trustee, and such other persons as the Court may designate, to fix and determine the division of creditors and stockholders of the Inland Gas Corporation into classes according to the nature of their respective claims and stock.

Respectfully submitted, Clifford E. Smith, Attorney for Ben Williamson, Jr., Trustee, Inland Gas Corporation."

Now, Mr. Clerk, I want to see the responses that have been filed to this classification.

Mr. Davis: If the Court please, as representing the Trustee of the Carbreath Gas Company, we have not filed a formal objection to the failure of the Trustee of Inland to classify the claims of the Carbreath against Inland. We do want to note our objection to the failure of the Trustee to so classify those claims.

The Court: If you are going to make any objections or response, I expect you had better put it in writing, so it will be in the record.

Mr. Davis: All right.

The Court: Somebody else has filed a response that they object to the classification here.

Mr. Bowers: I filed an objection.

The Court: Come over here and see if you can identify it. There is so much of the record here that it is hard to [fol. 73] locate it.

Did Mr. Rosner file an objection to this classification too?

Mr. Apisdorf: Not that I know of.

The Court: Mr. Bowers' objections and exceptions read as follows:

"The Objections and Exceptions of Carl B. Early, Daniel Matthews, Thomas Matthews, P. G. Meador, Jack Patton and Other Debenture Holders to the Report of Ben Williamson, Jr., Trustee, of Inland

Gas Corporation Classifying Creditors and Stockholders of the Inland Gas Corporation.

Carl B. Early, Daniel Matthews, T. C. Matthews, P. G. Meador and Jack Patton, owners and holders of Ten Year 7% Sinking Fund Debentures of the Inland Gas Corporation, object to and take exceptions to the classification of creditors and stockholders filed by the Trustee herein on March 27, 1944, and to that part of said report wherein the said Trustee reports that the Ten Year 7% Sinking Fund Debentures and the 6% Gold Notes (otherwise known as the $400,000.00 note) are equally and ratably secured by the indenture of mortgage dated January 2, 1930, made by the Inland Gas Corporation to the Ashland National Bank, Trustee, and in support of said objections and exceptions said holders of said debentures assign the following grounds:

1. The $400,000 note in question is owned by the estate of the American Fuel and Power Company, a corporation, The American Fuel and Power Company is a holding corporation, and is the owner and holder of all or a majority of the capital stock of the Kentucky Fuel Gas Corporation, the Carbreth Gas Corporation, the Inland Gas Distributing Company and the Inland Gas Corporation, and some other small corporations engaged in the business of producing and [fol. 74] marketing natural gas. The American Fuel and Power Company was interested in and was promoting a pipe line for the purpose of carying natural gas from Ironton, Ohio, to Detroit, Michigan, and in the promotion of said pipe line it assisted in organizing and promoting the Northern Industrial Gas Company, the Northern Gas Company of Ohio, The Northern Gas Company of Delaware, and the Howe Oil and Gas Company, and partially financed the four companies in an attempt to promote and build said pipe line from Ironton, Ohio, to Detroit, Michigan, and expended large sums of money upon said promotion.

The said American Fuel and Power Company after obtaining the majority of the capital stock of the several subsidiaries including the Inland Gas Corporation, and as owner and holder of substantially all of the capital stock of said Inland Gas Corporation, by

and through its officers elected the Board of Directors of the said Inland Gas Corporation and directed and dictated the election of the officers of said corporation; and as such stockholders completely dominated and controlled said Inland Gas Corporation and exercised full and complete control thereof; and these respondents are advised and charge, that the American Fuel and Power Company while in full control thereof and while fully dominating and controlling the affairs of said corporation, caused the officers and directors of the said Inland Gas Corporation to issue the said $400,000 note, so that said American Fuel and Power Company could obtain and use the credit of the said Inland Gas Corporation created by said note for the purpose of obtaining funds in the promotion of said pipe line from Ironton to Detroit; and that said American Fuel and Power Company did use said note, or a note of the same denomination for which this note was issued, in its place and stead, at the Chatham Phenix National Bank and Trust Company of New York and used the funds obtained thereby in the promotion of said pipe line.

2. At the time the said note was issued, the Amer- [fol. 75] ican Fuel and Power Company, the present owner of said note, owned about 99% of the capital stock of the Inland Gas Corporation; that it completely controlled said corporation, and dominated and directed the Board of Directors and officers of said corporation, in all of their acts and deeds, and as a matter of fact, at the time said note was so issued the Board of Directors of the Inland Gas Corporation was composed of a majority of the Board of Directors of the American Fuel and Power Company; that by reason of its dominant position and by the exercise of its influence, over the officers and directors of the Inland Gas Corporation, and by and through its officers and directors caused said note to be issued and delivered without valuable consideration.

3. The 7% Sinking Fund Debentures held by these respondents were issued on February 1, 1928, pursuant to and by the terms of the Indenture of agreement bearing that date, between the Inland Gas Corporation and New York Trust Company, as Trustee,

in which Indenture the Inland Gas Corporation, covenanted and agreed not to incur any further indebtedness (other than current operating expenses) until the said Ten Year 7% Sinking Fund Debentures had been retired; that this $400,000 note issued at the request of the American Fuel and Power Company, subsequent to said agreement was in violation of said agreement, of all of which the American Fuel and Power Company had full knowledge.

4. On account of the dominant control of the American Fuel and Power Company, the holder of said note, at the time the same was issued, and of the fiduciary and intimate relationship existing between the said American Fuel and Power Company and said Inland Gas Corporation and their respective officers and directors and of the influence wielded thereby and the manner in which said transaction was conducted and the circumstances surrounding the same, the claimants should be required to make full and complete disclosure of all of the many and sundry financial trans-[fol. 76] actions had between the said American Fuel and Power Company and the said Inland Gas Corporation and especially all transactions relating to the issuance of said note; and should be required to show absolute good faith and the justice of their demands and fair dealings between said corporations with reference to the transaction upon which they make their claim.

Those respondents, therefore, request that the Court order a complete audit to be made of the books of the Inland Gas Corporation and the American Fuel and Power Company with reference to the transactions between those two companies so that a full disclosure of said transactions may be made; and if the facts herein alleged are found to be true, that the said $400,000 note be cancelled or subordinated to the claims of these respondents." Signed by these creditors and by their counsel, Mr. Bowers.

Gentlemen, that is factual matter.

Mr. Davis: If the Court please, it is the understanding of counsel for the American Fuel Trustee that the facts surrounding the issues of over $400,000 dollars of Gold Notes is substantially contrary to the facts as alleged. We

would like to have an opportunity to traverse those facts in the record, and I would suggest that there should be time set down for the taking of proof on the allegations made in the record.

Mr. McConaughy: Your Honor, I have a suggestion to make about this classification of creditors which might save a little time. Why can't an order be entered classifying the creditors substantially as requested here, leaving it subject to amendment if circumstances later should necessitate such a change? In other words, you would reserve jurisdiction over the classification of the creditors. I also have an objection to the omission of the Carbreath claim, but I don't see why we would have to have a contest about this and Mr. Bowers' claim. It is a tempest in a teapot.

The Court: You have nothing to pay it with. It is under litigation.

[fol. 77] Mr. McConaughy: That is right. It is just a basis for a proceeding; and then if it is necessary to litigate all these things, a motion can be brought to amend that classification.

Mr. Bowers: Your Honor, I don't agree with Mr. McConaughy that there should be an order entered confirming the classifications made by the Trustee, at this time. If we are going to leave that open I think it should be left just as it is with the pleadings and objections filed. If these gentlemen want to file pleas to the objections, that could be done, and if the Court doesn't want to hear that at this time, and later on the funds are available to make distribution, that would be satisfactory to me; but I don't want an order entered at this time confirming the classifications as set up by the Trustee and later on to be bound by it.

The Court: What would be your objection to an order of this kind of classification reported by the Trustee, approved and confirmed at this time subject to the exclusion of the Carbreath claims from class four and except as to the provisions of class three that these debentures and the $400,000.00 gold note are secured equally and ratably upon a second mortgage, which matters are reserved for determination of the classification at a future date if and when it appears, that those matters are material? Would that protect you? At least it would confirm the classification with those exceptions.

Mr. Bowers: I think that would be satisfactory, Your Honor.

The Court: Do you have any objection to that, Mr. McConaughy?

Mr. McConaughy: I would like to see the order retain a little more than that. I would like to see Your Honor reserve making a ruling on the matter and keep it open for further modifications as the circumstances might require.

The Court: If you are going to leave it open, there is no use making an order at all.

Mr. McConaughy: I think there ought to be something like that entered. It is up to the parties to move to do it if they want to.

[fol. 78] The Court: When does a classification order become set? Somebody has got to reach a point where the group of claims ought to be finally settled, certainly as far as the operating expenses and the first mortgage claims are concerned, class one and class two, and as to certain other of these. Of course, the Court has control over the classification all the time.

Mr. McConaughy: I think Your Honor has control over it all the time.

The Court: I don't think there is any doubt about it.

Mr. McConaughy (continuing): There is no absolute immediate necessity for this classification existing. There is no plan for sending money to the creditors. When you submit a plan, you don't know how long it will be before there is an acceptance of it.

The Court: I don't know either, but the Circuit Court of Appeals directed this court to make a classification. It is a condition precedent to working out plans. We have gone and worked on plans time and again and have never had to change a classification. It can be fixed up to a certain point. If it has to be opened up for any modification——

Mr. McConaughy (Interposing): If it is going to be opened up, we would object on the part of the debenture holders, in that they did not pay any consideration for that; it was purely a gratuity. It was after debentures had been issued. I object for the debenture holders. I will put that in writing.

The Court: We will let you have that reservation. I would think it would be a very good idea.

Judge Stoll: I don't know whether, if the Court please, the Court understands this second mortgage. There was outstanding a certain amount of debentures. I am, of course, old fashioned enough to consider a debenture as nothing in the world but a promissory note, and an unsecured promissory note. That is the way I understand it. Now, that debenture was not secured by but was apparently regulated by about forty-five or fifty pages of printed matter. There was an agreement, a provision in the agreement that there would be no other indebtedness incurred [fol. 79] except to the extent of four hundred thousand dollars by Inland. Some time after that Inland executed a lot of notes and on January 1, 1930, wasn't it? I believe this note of $400,000.00 was issued, and they had a lot of conditions, one thing and another. Then the next day a second mortgage was executed, equally securing the debentures and the $400,000.00 in notes, and it is this second mortgage that we are talking about. Neither the notes nor the debentures were secured at all up to the time of the execution of that second mortgage.

I just thought the Court might want to know just what we are talking about. That is the situation. It may have been some——

The Court: Let me see—simultaneously with the mortgage?

Mr. McConaughy: The notes were executed simultaneously with the mortgage.

Judge Stoll: It could have been the same day or a day or two afterwards. Let me have that copy.

Mr. Bowers: If the Court please, I would respectfully request these gentlemen——

The Court (Interposing): I didn't understand you, Mr. Bowers.

Mr. Bowers (Repeating): I say, I would respectfully *respect* these gentlemen that are making the objections and exceptions to the classification, that they should be required to enter—to file written memoranda of it, so we may be able to meet the proposition when we come to it. If they now want to——

The Court (Interposing): If I understand the objections that have been offered, they are limited to the Class Three classification?

Mr. Bowers: That is right.

The Court: There is no objection to Class I or Class II?

Mr. Bowers: No.

The Court: The only question is whether some of those embraced in Class III would drop down into Class IV.

Mr. Bowers: That is right.

The Court: And that matter would become material only if upon an appraisal in view of a proposed plan it [fol. 80] appeared that either of these creditors was going to be accorded a share in the reorganized corporation?

Mr. Bowers: That is right.

The Court: If, on the other hand, the ultimate results are that there is nothing for anybody except the first mortgage creditors, there would be no use fussing over this here now. I cannot help but be impressed with the suggestion that we need not cross that bridge until we get to it. At the same time we ought to go as far as we can in approving the classification or that feature of the classification to which there is no objection.

Mr. Davis: One thing further occurs to me, if Your Honor please. The gentlemen here has alleged in his objection to the Trustee's classification that there was no consideration for the issuance of these $400,000.00 worth of notes. If that statement were proven true, it might appear that the $400,000.00 worth of notes were not entitled to get in the classification at all, and since the question has been here raised by some of the interested parties as to the after acquired property that was acquired by Inland and also as to whether or not the benefits resulting from the subordination of Columbia's claims were free assets or not, I say, in view of what the gentleman has alleged in his objection here, this might become very material even at the present time.

The Court: How would it be material at the present time if there are no assets to distribute below the first mortgage creditors?.

Mr. Davis: Your Honor, if the gentlemen who are so insisting, for instance, that Columbia's claims become available for the general creditors, and are not under any lien at all, may not succeed in their claim to make available its assets to be spread over all the claims, the general claims they have mentioned, the question as to whether these $400,000.00 worth of notes are of any value becomes material to that extent.

The Court: I understand, but it has not been decided, it has not been adjudged that there are any free assets.

Mr. Davis: I understand that that is presented to this Court as a part of this hearing.

[fol. 81] The Court: It is part of another hearing on another proposition. Of course, the outcome of that may give rise to the materiality of determining every issue that is presented here in this objection. The only question I am to determine now is what character of order to enter which will leave open for determination the objections and exceptions that have been filed here by Mr. Bowers' clients and that are proposed to be filed by you two gentlemen. I would suggest this: Can you get your objections in by tomorrow morning?

Mr. Davis: Yes, sir.

The Court: Can you too, Mr. McConaughy?

Mr. McConaughy: Yes, sir.

The Court: You can have them here in the morning in written form so that we can get an order entered that will reserve the determination on those objections and exceptions, and approve the classification in all other respects. Of course, I think any order of approval, gentlemen, is open to the Court's modification as long as the Court has control and jurisdiction over this case.

Do you want to say something, Mr. Odenweller?

Mr. Odenweller: I have the feeling that counsel is not making the distinction between the classification order and the allowance for claims.

The Court: We can judge that better when we see their objections in the concrete form. Now, Mr. Bowers' objections in part are to the merits of the claims, but in part he raises the question as to whether or not they are of equal standing, admitting that they are both valid claims.

Mr. Odenweller: He raises the Deep Rock question in the objections, that go to the merit of the claim itself.

The Court: He also raises the classification question.

Mr. Odenweller: Not to the classification.

The Court: That is not the only objection he raises.

Mr. Odenweller: He also raises the consideration of the classification as to whether it is a valid claim.

The Court: He raises the Deep Rock question about controlling a parent company, but I don't believe he has quite limited himself to that if he can't score there. He

still says that there are reasons for which they should not [fol. 82] be classified on a parity with each other.

Am I correctly interpreting you, or are you limiting yourself by the Deep Rock case?

Mr. Bowers: No, sir, I didn't put that limitation on it in my opinion.

The Court: I didn't gather that it was quite so narrow.

Mr. Odenweller: Of course, in looking at the claims on their face, which I think you should do in making your classification, you find two claims or two groups of claimants, both of whom are secured by the second mortgage document.

The Court: Yes.

Mr. Odenweller (Continuing): That is a natural grouping for that classification there of the second mortgage people. In that grouping one of [illegible] persons may have done something or another [illegible] determination of their claim puts him down [illegible] as far as the participation in the plan is [illegible] nevertheless as far as his classification, he is still in the same type or category; you might say they are both second mortgage holders; because he had no consideration, that makes his claim invalid, doesn't it? He just drops out of the picture. He may have been subjected to the Deep Rock subordination theory and therefore be required to take a place of participation below others in the same class, and I don't like to ask the Court to try issues on claims where we are trying to settle the question of classification, because I think that it belongs later when the report of the Trustee for an allowance of claims comes on for determination.

The Court: Why should the claim recite anything specific as to who was in the classification, but merely state that in Class Three will be embraced all claims that are embraced in all second mortgages on the property inferior to the first mortgage embraced in Class Two, and then leave it for final determination as to who fall in that class?

Mr. Odenweller: I think it should be sufficiently definite as to which class, that security holders would know under what classification they would fall. Beyond that I don't think you have to go. I have taken issue with the Trustee on his method of setting up Class One and Class Two by [fol. 83] elimination of Columbia's claims. I think his classification is fine if you stop with the first paragraph after describing the bonds, for the Columbia claims are in

that class. What Your Honor has stated is, I am not going to permit you to approve your bonds in my court; but that doesn't destroy them. They are still in that classification. If the Circuit Court of Appeals or the United States Supreme Court should reverse your decision, then they would come back here and there must be a class to receive them; therefore, I think the classification should end with a description of the people. For instance, in Class Four the Trustee makes a statement that he is omitting from the classification. My point is that he cannot omit from the classification. The claims should be classified. They are omitted from payment by not classifying them, to the disallowance of their claims. There is nothing that the Trustee can do to omit them from classification; he has failed to establish, present and classify them, and yet they must be in some class, have the right to fall in some class, and he recognizes that they must be in some class in rejecting their claim. It is incongruous to say, I do not recognize them as being in any class, after he has recognized them as not having any claim.

The Court: If this classification read this way, class one, fees, allowances and expenses, that would probably be general enough to cover——

Mr. Odenweller (Interposing): Class One.

The Court: (Continuing): And if class two should read, all claims secured by the mortgage or deed of trust dated February 1, 1928, between Inland Gas and the Trustee——

Mr. Odenweller (Interposing): Class Two are all first mortgage bonds.

The Court: Were all claims secured by that mortgage?

Mr. Odenweller: He has in effect said that here, secured by mortgage.

The Court: I don't know whether anything else is secured by that mortgage or not, but a general statement would point to what that class is. That class is not any particular claim, but it is a class of claims secured, all of them, by that first mortgage indenture.

[fol. 84] Mr. Odenweller: That is correct.

The Court: (Continuing): That may not only include bonds but some coupons of a man who does not have any bonds. I don't know, but a general statement that class two will embrace all claims that are secured by the mortgage or deed of trust dated February 1, 1928, between the Inland Gas and the Chatham Phenix National Bank

and Trust Company and James F. McNamara, trustees, wouldn't that be a designation and description of a class sufficiently definite and clear, gentlemen, so that anybody would have simply to decide whether your claim is secured by that mortgage, by bond; and if so, then the note would be secured by the mortgage and would fall into the class here, wouldn't it?

Mr. Odenweller: That is the point I was trying to make.

The Court: Just stop right there. Now, then, in Class Three would be all these claims which are secured by the second mortgage executed February 1, 1928, between Inland Gas Corporation and your Trust Company as trustee?

Mr. Davis (Interposing): That date is in error. The date is January 2, 1930. The instrument dated in 1928 was simply the instrument under which the debentures were issued.

The Court: That was not a mortgage?

Mr. Davis: No, sir.

The Court: Well, why wouldn't a general statement then be proper that in class three would be embraced all claims which were secured by a second mortgage made January 2, 1930, by the Inland Gas Corporation and the First National Bank of Ashland, Kentucky, without deciding where each man falls? That may have to be decided when each man presents his own claims here.

Class Four, that is all general unsecured creditors.

Class Five, that is stockholders.

That is all we are engaged in doing now, I think it is proper here to prepare a general classification, but I am just wondering whether or not we are getting very far if the Trustee doesn't report a classification of the actual claims themselves. For the trustee merely to report a prin- [fol. 85] ciple upon which the claims will be classified is a very simple matter. In order to get at specific objections to certain claims being classed here, there and yonder, isn't it necessary for the Trustee, for those claims that have been filed, to say these are the classes, and I report the following claims for the classification of the claims filed: Class One, bonds owned by so and so and so and so; Class Two, debentures, Class Two, gold notes; Class Three, certain general claims. They have the same class today; and then if anybody wants to object to any particular allowance under that class, they have something to shoot at. That was the

idea that I had in mind that the trustee would put in force. I don't know how extensively these claims have been proven with the trustee; I don't know what would be necessary for the trustee to have in order to classify all these claims specifically; and it was a matter that I thought we ought to thrash out.

What is your idea about that, Mr. Odenweller?

Mr. Odenweller: After the claims are classified——

The Court (Interposing): You mean after the principal classifications have been approved or adopted?

Mr. Odenweller: Yes, sir; your next step is to bring the claims on for consideration for allowance, and if there are any objections to the allowance to any of the claims, then those allowances are determined, and the order is entered accordingly, and you then have fixed liabilities of the debtor. To date, you have no determination in this case as to the actual liabilities. That is why I didn't like the form in which the Kentucky Fuel Gas classifications were set up, because by setting up the amounts, it leaves the indication that it is a determination, which has not, of course, been made, and it hasn't been brought on for determination, and by bringing the claims on for determination, you will be able to have disposed of those Deep Rock theories and on the American Power claim and any other objections that people have to the allowances in full to any of the first mortgage bonds——.

The Court (Interposing): I see.

Mr. Odenweller (Continuing): But that step usually follows classification and of course classification is neces- [fol. 86] sary for voting on the plans of reorganization, for you vote by classes, and it is this percentage of classes affected by the plan that determines whether or not it is accepted.

The Court: I don't see how it means anything until you have first gotten a list of the allowance of the claims and the amount of each that will fall under that class. Just simply to have a statement of the group in which each claim falls doesn't advance you very far.

Mr. Odenweller: No, but just as I said before, it is the first step.

The Court: What I am talking about is bringing the matter up in two steps; why not do it all at one time when you report a claim?

Mr. Odenweller: Because if you just ask for the filing of claims without segregating them into a certain category that they would fall into, you would have just a bunch of claims. And while it is simple enough to classify them in some instances you have natural groups, and this order is just an order which is supposed to set forth a natural group.

The Court: Don't you understand that claims have been filed and allowed a long while ago?

Mr. Odenweller: They have not been allowed.

The Court: They have been allowed. I don't know whether it has——

Mr. Browning (Interposing): Yes, they have been allowed—

Mr. Odenweller (Interposing): All claims filed?

Mr. Browning: All claims to which there were no exceptions have been filed.

The Court: I think there was—I know there was an order made that all claims should be filed within a certain time, and I think probably Mr. Browning and some of the rest of you will have a clearer recollection of it—I think following that order the Trustee filed a report of claims and they were set down for confirmation and no exceptions were filed, and the order of filing was made. I think that was done before the previous effort of reorganization.

Mr. Odenweller: I remember at the last hearing I asked that very question of counsel here when we were discussing [fol. 87] this order on the classification, and somebody answered that they had not been allowed, and that was why we started out on the classification step, just to get the allowances out of the way.

The Court: I think if you will examine the record—I am not sure when I examined this record—you will find that there was some sort of a classification, but I am convinced that there was an order made requiring claims to be filed within a certain time, and I think probably Mr. Browning and some of the rest of you will have a clearer recollection of it. I think there was an order that claims were not moving. I don't know how many, maybe some have come in since in late years. I don't know about the claims as represented here today. Some of these other committees——

Mr. Browning (Interposing): Let me recall to Your Honor's mind that when the Columbia Gas question came up there was sought an opinion by counsel, and it became necessary to set aside so much of the order as approved claims relating to the Columbia claims. You will find in this record an order approving all claims that have been filed, and that includes both first and second mortgages; the trustee filed both of them and they have been approved long ago. I think that is included in the second mortgage; and then there was some——

The Court (Interposing): I think there is an exception as included in the second mortgage, and that the Carbreath claims were not approved.

Judge Stoll: And the Hamilton claims and Piney claims were not approved.

The Court: They may have been approved as general claims. Yet all the claims that were asserted as lien claims against the trustee, they were disapproved as lien claims, but I think they were later approved as general claims.

Judge Stoll: My recollection is that Carbreath filed a claim in Delaware before the case was moved here, but that afterwards an amended claim was filed, a motion to amend in that claim was filed, and nothing ever done about it.

The Court: There was never any allowance of the Hamilton and Piney and the Carbreath claims, for those [fol. 88] claims were based on unliquidated damages.

Mr. Browning: The Piney and Hamilton came on that and were represented by mere formal proof, and then there was a petition filed in which the whole matter was set out and they were heard on that petition and rejected.

The Court: You mean the Hamilton?

Mr. Browning: Yes; rejected as preferred claims.

The Court: That is right.

Mr. Browning (Continuing): But there was nothing ever done about them as general claims, and of course they went out of the picture. There was another claim filed on behalf of Carbreath under 77B in the receivership suit.

Judge Stoll: No, there has been a claim——

Mr. Browning (Interposing): We had a second hearing later on, and there was one filed by Carbreath later at a second hearing, and then later on, I would say within the last three or four years, there was a claim tendered in behalf of Carbreath that has never been acted upon.

Judge Stoll: That is correct.

The Court: There was a claim asserted here by Columbia and we litigated that. Whether that claim was ever allowed as a general claim or not, I don't know. It was an absolute first preferred claim that was affirmed. That is, we disallowed that as a preferred claim and it was affirmed. You remember that, Mr. Browning and Mr. Jaques. But I don't know whether that has ever been allowed as a general claim. There were reported and allowed a large number of claims, probably embracing all the claims against the estate.

Mr. Browning: Columbia's claim was rejected by Your Honor's order in the anti-trust proceeding.

The Court: Yes, of course, we eliminated that, but I believe prior to that time we had had some litigation over that claim as a prior claim and it was denied as a prior claim, and I suppose was allowed as a general claim, I don't remember. Then, of course, this last order there was an order entered setting aside all of Columbia's claims. It is upon this order that these claims were disallowed. The point that I make is this, if these claims are here in the record as allowed, why should not the trustee file a report [fol. 89] setting out a classification which would designate these claims heretofore proven or which may be proven within a certain period and fall in a certain classification or particular designation? Why have so many steps?

Mr. Clifford E. Smith: The trustee is prepared to do that.

The Court: Is he?

Mr. Clifford E. Smith: Yes, sir.

The Court: As soon as we decide upon the classification to be utilized, the trustee then is prepared to file a report of claims designating the classification into which they fall, is that right?

Mr. Clifford E. Smith: Yes, sir.

The Court: These claims have all been proven?

Mr. Clifford E. Smith: I understand they have.

The Court: I don't know about that. That will have to be looked into.

It is now four o'clock and we will adjourn until tomorrow morning at ten o'clock.

Court was here adjourned at 4:04 P. M. on Tuesday, April 11, 1944, until the following morning at 10:00 o'clock.

Court convened at 10:00 A. M. on Wednesday, April 12, 1944, pursuant to adjournment from the preceding day.

The Court: Gentlemen, are you ready to proceed? Are the interested parties here?

(Reporter's Note: All the interested parties appeared to be present.)

As you are all aware, the Van Horn Committee filed a petition or application for a distribution to the first mortgage bondholders out of the liquidated assets, cash and securities in the hands of the trustee as shown by his audit or report of June 30, 1943, the amount asked was a distribution of $500 on each $1000 dollar bond, or a bond of smaller denomination in proportion. I understand some of the bonds are $100 and some $500 bonds. Since the 1943 report of the trustee there has been a subsequent report filed by him which indicates an increased amount of funds in his hands that are available for distribution. The trustee has filed a response to the petition indicating his desire [fol. 90] that a distribution be made in order that further accumulation of interest be saved, and that he be relieved of the heavy responsibility of caring for this large amount of money in his custody; but he presented for determination several questions which the trustee regards as of sufficient consequence that they should be decided and determined before a distribution is made. The trustee indicates to you the view that a distribution could not be made safely without a determination of these questions.

There have been responses also filed by the various creditors' committees or groups of creditors, not only responses to the Van Horn petition for distribution, but also responses which state the position of the various groups upon the questions that have been presented by the trustee in connection with the matter.

The Lillienthal Committee very vigorously urges that none of these questions should be decided at the present time for the reason that they are matters appropriate to the function of reorganization efforts by the parties, with a view of adjusting, compromising, resolving these conflicts through means of a plan of reorganization. Now that position is disputed by certain of the other committees who insist that each of these questions is of such consequence that their decision is not only a necessary precedent to

reorganization but a condition precedent to the same distribution of a substantial amount of the funds. If you gentlemen want to argue that general proposition before we take up the question, I say to Mr.—Mr. McConaughy and some of the others who argued the same view point, that I have read your briefs with a great deal of interest, and if you want to add anything to what you have said on the point, of course, I want to give you that opportunity.

Mr. McConaughy: I have nothing further to say, Your Honor.

The Court: Well, my conclusion is that these questions ought to be decided. Of course, it might be premature to hasten into these questions if we were only looking forward to the reorganization effort, but we are confronted here with that which amounts to a step that is using up this property. A distribution of this size calls for a distribution in a large [fol. 91] measure of the sums that would be called for in a reorganization plan, it seems to me, and while there is a difference in the essential nature of the decision at this time on account of the difference in the question, I think it is advantageous that these questions be decided now, so that if there is any dispute about them, if there is any appeal taken from the decision of the court, these appeals may be prosecuted wtihout waiting for that delay that would follow if their plan of reorganization were submitted. It seems to me that we can save time from the reorganization standpoint if each one of them is of such a nature that its determination would be a condition precedent to the fairness of a reorganization plan. I don't see how any reorganization plan could be adjudicated to be fair and equitable that was not preceded by a determination of the full amount that was due the first mortgage bondholders; otherwise, there would be no way to determine whether or not they were made whole, under the rulings made in the case of the San Francisco Products Company vs. Dubois with which you are probably familiar, a barge case probably. It says that the first mortgage bondholders have to be made whole out of the secured property first, if it is sufficient. We can't decide what makes them whole until we determine what makes them whole, unless we can determine what the whole is, so that bears on the importance of the question, the first question, as to whether or not these bondholders are entitled to recover on the coupons attached to the bonds. And I think

that substantially the same importance attaches to the further question on the matter of determining whether or not these liquid assets in the hands of the trustees are all subject to the mortgage or whether some part of these assets is free assets—I don't know—are essential problems to determine whether or not there are sufficient mortgage assets to cover the mortgage or whether there is a deficiency or not and so on. So I see no escape from determining those questions, and I propose to determine them provided the matters can be presented in such form that they are susceptible of determination at this time.

Senator Bulkley indicated yesterday that he was very [fols. 92-129] anxious to get away today, and I told him that after studying all the briefs that have been presented that there were two questions that I regarded as the most serious in the obstruction of an immediate distribution; and that is the question of the possibility of the results of the court's disallowing Columbia's claims as being regarded as a taxable gain and subject to income tax. And one other matter that has been suggested which has not matured yet into a claim, is that which has been presented by the Green Committee, in which they assert that there is a claim against Inland arising out of an alleged inequitable treatment of Carbreath, and Inland Distributing Company, in connection with the purchase and sale of gas. That there were certain intercompany adjustments of a very substantial amount that would deplete the resources of Inland and upon proper adjudication would require that Inland turn back to Carbreath and Little Inland, as we refer to it, a substantial amount of money. Now if it would facilitate Senator Bulkley's convenience, I will take those questions up, though I am inclined to take the questions up in the order presented. I want you to be heard on these two problems, for they are important questions to you.

. . . . . .

[fol. 130] Re: Whether First Mortgage Bondholders Are Entitled To Interest On Interest

Mr. Clifford E. Smith: Yes.

The Court (Continuing): That brings us to a consideration of the other questions submitted by the trustee in the response. We will take them up in order.

The first question is whether the first mortgage bondholders are entitled to interest on interest. I assume that means entitled to interest on the coupons that are attached to the bonds. I will be glad to hear any of you who wants to add anything to what you have said in your discussion and in your briefs. I have read all these briefs with much interest and the principal authorities cited.

Senator Bulkley: Your Honor, we contend that the first mortgage bondholders are entitled to interest at the rate of six and a half per cent, the rate of interest provided [fol. 131] in the covenant, and on the bonds at the same rate as provided in the covenant. We have nothing further to add. We think it is adequately presented.

The Court: Anything else from any body else? I am familiar with the position that the various committees have taken. You are opposing it, I understand that, Mr. Apisdorf.

Mr. Apisdorf: Yes, Your Honor; I merely want to point out the position taken by the first mortgage bondholders and the bondholders as set out in my brief. They have placed great reliance upon the American Brake Shoe case, which was decided by the Federal Court subsequent to the doctrine enunciated in the case of Swift vs. Tyson. I would like to point out, as I have in my brief, that there was a previous decision, prior to Swift vs. Tyson, which was handed down by Judge Mack, who was sitting as a judge of the District Court, and who proceeded with the distribution to the bondholders, coupon-holders and the receivership, and I believe, with the reorganization of the Interborough Railroad in New York. I would like to quote from Judge Mack's opinion as to what he thought the law of New York was in the matter of interest on interest:

> "But, under New York law, the indenture provision for interest after maturity on the other two classes of interest coupons is unenforceable, as violative of the public policy of that state," (citing Williamsburgh Savings Bank v. Town of Solon, 136 N. Y. 465, 32 N. E. 1058 (1893); Bailey v. County of Buchanan, 115 N. Y. 297, 22 N. E. 155, 6 L. R. A. 562 (1889); Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99 (1876).) "The question therefore as to them is whether New York law is applicable.

"Despite my personal views that state law ought to control contractual obligations made and payable in the state, especially in a case in the federal court dependent for jurisdiction on diversity of citizenship, the law is well established since Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (1842), especially as to commercial paper, that a federal court in the absence of a con- [fol. 132] trolling state statute applies what it may find to be the general commercial law in this country, irrespective of the decisions of the state court. Nor does the fact that the state decisions are based on what they deem to be the public policy or fixed public usage of the state change the situation," (citing, Black & White T. & T. Co. v. Brown & Yellow T. & T. Co., 276 U. S. 518, 48 S. Ct. 404, 72 L. Ed. 681, 57 A. L. R. 426 (1928).)

In that case Judge Mack, despite his views of what the New York law held to the contrary, held that a federal rule applied as contrary to the New York rule, and in that case he held that interest should be paid on interest, despite what the New York held. Subsequent to that decision and upon the Circuit Court's reversal of the doctrine laid down in Erie R. R. Co. v. Thompkins, the Court held that the Federal Courts were no longer to apply the federal law to state matters but were obliged to apply the local law of the state on all questions except those matters which were governed by the Federal Constitution or by act of Congress. As a result of that decision it would appear in all logic that in order that to litigate that the District Courts of New York would apply the New York law, which held to the contrary, and thus deny to coupon holders the right to compound interest. Judge Patterson, however, in deciding the second Brake Shoe case held that there was nothing in the New York law to prevent the payment of double or compound interest.

The Court: On the other hand he said there is nothing to preclude the payment of simple interest on interest coupons, and drew a very definite distinction between the payment of simple interest on coupons and a payment of compound interest on coupons.

Mr. Apisdorf: According to the exception to the New York rule which prohibits compound interest being allowed, and exception is made in the case of Williamsburgh Savings

Bank vs. Solon. In that case the Court of Appeals of New York definitely stated that compound interest was permitted to be computed only on those cases where there were negotiations and they were in the hands of third par-
[fol. 133] ties. From Judge Patterson's subsequent opinion it doesn't appear whether those coupons had been detached and were in the hands of third parties or not.

Subsequently Judge Clancy in 1940 in the case of Transbel Inv. Co. v. Roth made reference to the Brake Shoe case, and in acknowledgment of what the law of New York is with reference to compound interest cities, the second Brake Shoe case and the Williamsburgh Savings Bank case.

The latter case clearly holds to the proposition that that is good only where there has been a detachment and they are in the hands of a third party, and I submit to Your Honor that only in such cases is compound interest payable.

The Court: Unless I misunderstood Judge Patterson's decision in the American Brake Shoe case, he pointed out that the previous cases, the New York decisions that had denied recovery of interest, were cases which considered and dealt with only compound interest, that is, interest which had certain rest dates for re-compounding; and he pointed out that there is a marked difference between compound interest and simple interest on an interest coupon which under the contract is to bear interest. I think you have got to take that into consideration before you can have an understanding of what he had in mind.

Mr. Apisdorf: I understand that distinction, Your Honor.

The Court (Continuing): His distinction was pointed out in Young vs. Hill (67 N. Y. 162, 23 Am. Rep. 99), where the Court said:

> "Interest upon interest, promptly and incessantly accruing, would, as a general rule, become harsh and oppressive. Debt would accumulate with a rapidity beyond all ordinary calculation and endurance. Common business cannot sustain such overwhelming accumulation. It would also tend to inflame avarice, and harden the heart of the creditor."

And it was that character of interest that the New York cases to which he refers and upon which he comments in

[fol. 134] a very clarifying way, it was that character of interest that he dealt with he says in all such cases; and even in the Williamsburgh case there is no suggestion that a covenant to pay simple interest on overdue coupons would not be countenanced.

Mr. Apisdorf (Interposing): Your Honor——

The Co— (Continuing): I think it has that distinction between compound interest and simple interest, as he says: "Compound interest is adding of interest to interest at periodic intervals. Agreement to pay simple interest on overdue installments of interest is different."

Mr. Apisdorf: With all deference to Judge Patterson, I would like to read a quotation from the case of Williamsburgh Savings Bank v. Town of Solon:

> "But there is a remaining question open for consideration, and that is the allowance of interest upon the coupons from their date. It results in an award of compound interest which we have held not to be recoverable, except upon some new and independent agreement made upon sufficient consideration (Young v. Hill, 67 N. Y. 162). The inquiry here is, of course, whether the coupons sued come within that exception, and the solution of the problem depends upon their nature. We have already in this court determined what they are and described their character and quality. In Bailey v. County of Buchanan (115 N. Y. 297). Earl, J., said that while it was true that past due coupons payable to bearer when detached from the bonds are for many purposes separate and independent instruments which may be negotiated and sued upon without the production of the bonds, yet such coupons always have some relation to the bonds; that until negotiated or used in some way they serve no independent purpose; that while they are in the hands of the holder they rem in mere incidents of the bonds and have no greater force or effect than the stipulation for the payment of interest contained in the bonds; and that while they continued in such ownership and possession it can make no difference [fol. 135] whether they are attached or detached, as they are then mere evidence of the indebtedness for the interest stipulated in the bonds. I think that adjudication concludes us, and a re-examination of th

question in the light of the very full and able discussion in the present case only strengthens the conclusion then reached in which we all concurred. Interest, as a rule, follows the principal without becoming principal, and cannot be compounded by force merely of the contract; but that general rule has been modified somewhat by an exception growing out of the character and purpose of interest coupons. They may become separate and independent instruments. When they do the exception is for the first time needed and for the first time applies. Until they do the promise is merely to pay interest and is governed by the usual rule. They do not become separate and independent instruments until they are utilized as such. Before that occurs and while they remain in the hands of the holder of the bonds the occasion for the exception has not arisen and the exception does not apply. That is plaintiffs's situation. It is true it was prevented from suing by an injunction, but the damages occasioned by it are awarded on its dissolution, and theoretically at least cover all losses thereby sustained."

In my opinion, Your Honor, there is a clear and a definite rule in New York preventing interest on interest, simple interest on an undetached coupon bond until that coupon has been detached and negotiated with a third party. I don't see how the Court of Appeals could be much plainer.

The Court: Have you a case where simple interest on a bond was denied on a coupon?

Mr. Apisdorf: I have the quotation from the Talcott case.

The Court: Does that involve interest?

Mr. Apisdorf: I am just seeing if it does.

The Court: None of the cases cited that I have found involve the payment of simple interest on the indenture. [fol. 136] Sometimes they involve interest by inference. They sometimes involve compound interest, as stated by Judge Patterson, and anything in relation to that, that is where the coupon is detached for any strange reason, the reason for which isn't apparent to me; anyhow, that seems to be the New York rule, that they will even allow this terrific compounding of interest on coupons if they happen to be detached and sold. I find no case that held that where the parties agree to pay simple interest, that

that agreement was usury or that it was invalid for any reason.

Mr. Apisdorf: By describing it as simple interest, you are assuming your conclusion——

The Court (Interposing): I am not assuming anything. I am assuming that Judge Patterson pointed out a distinction that would be recognized by most anybody.

Mr. Apisdorf: Well, I am not one of those "Most anybody's".

The Court: All right, let's see if you disagree with this statement.

Mr. Apisdorf: I disagree one hundred per cent. He calls it simple interest, and then comes to his conclusion. I think Judge Patterson has made a wrong interpretation.

The Court (Reading):

> "Compounding interest is the adding of accumulated interest to the principal at periodic intervals. An agreement to pay simple interest on an overdue instalment of interest is different. The distinction was noted in Young vs. Hill, supra, where the Court said (p. 174), 'An agreement to pay simple interest upon the several instalments of interest as they became due * * * might not be unreasonable or inequitable.' "

Mr. Apisdorf: Yes, but Judge Patterson went ahead and said that there is a distinction and that the New York courts have not recognized that distinction, and have been criticized by the text writers for not doing so.

The Court: Let's see if he does:

> [fol. 137] "The same distinction between compound interest and simple interest on overdue interest instalments has been recognized elsewhere." (Citing a Colorado, a North Carolina, an Arkansas and a Florida case.) "While general statements may be found in New York cases to the effect that an agreement to pay 'interest on interest' is invalid; the fact is that the agreements under discussion were agreements to pay compound interest. In my opinion the cases dealing with compound interest do not touch the present case."

Now, the thing that Judge Patterson refers to as having been criticized by the text writers is the distinction that

some of the New York cases have made as to denying compound interest unless the coupons are detached.

> "The distinction depending on who holds the coupon is a curious one, and has not escaped the criticism of text writers."

Of course, it has not escaped the criticism of text writers. We are not concerned with that here. Nobody is claiming compound interest here. The criticism of text writers is immaterial, as well as the New York case.

Mr. Apisdorf: Isn't the question of whether they are going to pay interest on interest only applicable after the coupons are detached, after the coupons have been detached and negotiated with third parties?

The Court: No, I don't think so.

Does anybody else want to be heard?

Miss MacDonagh: I would just like to call Your Honor's attention to the language in the notes of the Interborough case in connection here with consideration of the first mortgage bonds. The language of those notes provided for the payment of principal and interest at the rate of seven per cent, payable in six equal amounts, in gold coin, semi-annually, on the first day of March and September, in each and every year until the payment of such principal sum. Now neither in the bonds nor on the coupons nor in the [fol. 138] indenture in this case is there any such provision for payment until the principal sum is paid. The provision appearing in the indenture is for payment of interest on overdue principal and overdue installments of interest, without saying up to what point; and the provisions on the notes or rather on the coupons is merely for some annual payment upon presentation and surrender as they severally mature, and I believe that even if we consider that the American Brake Shoe case, which is apparently against the great weight of authority in New York, as controlling up to the date of the maturity of the bonds, which in this case is 1938, yet there is nothing in the law of New York or any other state which would provide for the payment of interest on interest on overdue installments of the principal and interest from the date of maturity up to the present date, 1944.

The Court: My understanding is that the Supreme Court held in the St. Louis case against Dubois that interest

which properly accrued is to be treated the same as principal in a reorganization case, and they planned to approve a plan which didn't provide for interest that accrued up until the effective date of the plan. Are you familiar with that case, Miss MacDonagh?

Miss MacDonagh: Yes, Your Honor.

The Court: Isn't that true?

Miss MacDonagh: In the consideration of the reorganization where there would be various adjustments and not necessarily cash payment therefrom, be payments allowed on equitable principles allowing the secured creditors to compound interest up to the point of the reorganization of the business, but a——

The Court: Isn't it the general rule in bankruptcy that insofar as property which secures the debt may be sufficient, a secured creditor is not denied interset out of his security up to the date of the payment?

Miss HacDonagh: If I understood it, Your Honor, if there were sufficient assets to pay off——

The Court (Interposing): No, if there were sufficient credits to pay it. Are you going to take away this man's security? For instance, if the value of the security is sufficient to pay all that is due under his mortgage, both [fol. 139] principal and interest, isn't it the established rule in bankruptcy that he is entitled to the full amount of that security until he is satisfied in both principal and interest?

Miss MacDonagh: Your Honor, in this case all that the bondholders here bought they contracted for, and they were very generous and felt that on the ground of equitable principles they should be given interest even up to the time of the maturity of the bonds, that is all that they contracted for; and as I understood—and I am not terribly familiar with the situation here—this company is insolvent and has continued to be insolvent and they have insufficient funds and cash assets to provide for payment to their creditors, assets even to the full amount of the first mortgage secured creditors, so that under general equitable principles applied under Chapter 10 of the Bankruptcy Proceedings, as far as cash distribution would be made, I would not think that the interest would go beyond that maturity date. I just wanted to point out what is clear New York law, beyond the date of maturity of the bonds, under bankruptcy rules.

The Court: I wish it were as clear as you seem to think. Does anybody else wish to say anything?

Mr. Bowers: Your Honor, I speak for some of the second mortgage holders whose position, if this rule prevails, is rather precarious, for this means a good deal to this estate if this interest is paid on these coupons, which runs six or seven hundred thousand dollars,—more than half a million dollars.

The Court: That doesn't affect the question any, does it?

Mr. Bowers: No, that doesn't. I am just speaking of the precariousness of our position if this rule prevails. So after all in these bankruptcy proceedings the Court is bound by the contract, but on the other hand where it is a question of fair dealing and equity and justice, that has been in the discretion of the Court. Now it appears that the proponents of this question rely upon the Brake Shoe case, which is in the District Court of New York; and while that case is perhaps persuasive, it is not binding upon this [fol. 140] court in any way. It is very persuasive, because it is a judge sitting in that state interpreting the law of the State of New York. I don't think there is any question but what this contract is a New York contract and is governed by the New York law. I think that is admitted in practically all the briefs filed here.

Now, as the Court has just announced, there is apparently distinction between interest on interest, or compound interest, and simple interest. Now, in this case it is interest on interest coupons, past due interest coupons, after the principal even becomes due. Some of this claim would be before the principal became due, and some after. A great deal of it would be after the principal debt became due. Now, I don't know whether it is a switching of phrases, or there is a difference in compound interest and simple interest in the amount, but as has been said by the District Court, by Judge Clancy, I believe, of the District of New York, that the character is the same; the principle is the same; and after all, it is the principle that the public policy of the law of New York applies. It is all interest on interest.

In the Transbel case handed down since the Interborough case, the question arose there as to interest on a note made in Florida, and the interest was due monthly,

and when the calculation was made, it was based upon a monthly—on the interest due on that note each month. The way that calculation was made the interest due each month was added to the principal and interest calculated on the principal and the added interest. The difference here in this case is that the coupons come due here semi-annually and interest on those coupons is added to the coupons. I would see no difference if the coupons were added to the principal, because the principal is drawing interest; we are not denying that the principal is still drawing interest. If the coupons were added to the interest and the interest calculated on the principal and the interest too, it seems like there is a distinction without a difference. There is a little difference in the amount, is all. The character of the claim is just the same; it is interest on interest.

[fol. 141] The Circuit Court of the Sixth Circuit, relying upon the interpretation of that policy of New York, it seems to me, laid down the law in very plain language here that prevails in this District, and they call it interest on interest. Whether it is interest or compound interest, it is rather in the middle of the road; I would say interest on interest. Compound interest means interest on interest, and simple interest on coupons means exactly the same thing, because the coupons represent interest, and if they draw interest, it means the same thing. The only difference is a little difference in the amount the way they are calculated.

I filed a brief with reference to this matter and cited the authorities that I could find on it, to give the Court as much light on the subject as I knew how. I had seen the opinion handed down by Judge Patterson and had read it and also the opinion of Judge Clancy, and in the opinion of Judge Clancy in the Transbel case, this appears:

> "New York public policy prohibits contracts on prospectively contemplated payments of interest on interest, which is often described as compound interest, because it differs from compound interest not in character or quality but only in quantity."

I don't know, Your Honor, but it seems that Judge Patterson in his opinion has apparently made a discovery rather than laid down a rule, and he has discovered quite a distinction between interest on an interest coupon, and compound interest. As it seems to me that the principle announced by the Court—in the case of Carlisle v. Mer-

cantile Company—no doubt the Court has gone over that, and I think it was cited in two or three of the briefs filed here—this principle is laid down in that case by Judge Lurton, who handed down the opinion, and I don't know from the broad language he used whether he meant simple interest, what we call simple interest on interest on a coupon, or interest on an interest bearing coupon, that is simple interest, that is not mentioned in this case, but it does amount to a matter of interest on interest.

The Court: They didn't have any interest coupons in-
[fol. 142] volved in that case, did they?

Mr. Bowers: Yes, sir; interest coupons were involved in that case.

The Court: Wasn't the agreement out on them when they were past due?

Mr. Bowers: There was an agreement just like there is in this case; and I want to call the Court's attention to this, that the bonds and coupons in this case do not provide for the payment of interest after they are due.

The Court: The indenture secures them?

Mr. Bowers: That is right; there is a supplemental agreement filed of record in the State of Kentucky which——

The Court (Interposing): Between the trustee and the company.

Mr. Bowers: The trustee and the company. Now as for the securities themselves, there is no such provision.

The Court: Isn't that provision attachable to the securities?

Mr. Bowers: No, the security is a negotiable paper that passes from hand to hand. However, if there is an agreement between the trustee and the company, that agreement is perhaps binding. We are not denying that agreement, but I say, Your Honor, there is no provision there as to the instruments themselves providing interest after past due.

Now, in this case of Carlisle v. Mercantile Company in a Circuit Court of this District, the Court held this:

> "Where principal and interest of railroad bonds are payable in New York, in the absence of provision otherwise, they are governed by the statutes of that state relating to interest, and under such statutes interest is not recoverable on coupons which remain in the hands of the holder of the bonds from which they have not been detached."

Now, Judge Lurton reviewed the statute laws in the different cases in the State of New York. Not only that, but he made a general review of the law as to the payment of interest on interest on coupons, on past due coupons, and those were checked up to be due.

[fol. 143] I am not taking up too much time, I hope——

The Court (Interposing): I have read it very carefully, but I am very glad for you to go over it again for the benefit of those who have not read it.

Mr. Bowers: It says this:

> "Among the exceptions taken by the appellant to the master's report was one to the allowance of interest upon coupons of prior lien bonds in the hands of the holders of the bonds, to each bond to which the coupons in controversy were attached and from which they had never been separated."

Now, that prevails in this case; the coupons are attached to the bonds which are filed here, so far as we know, and from which they have never been separated.

> "—promises to pay the sum of one thousand dollars to the holder with interest thereon in like gold coin at the rate of five per centum per annum from the first day of November, 1895, interest payable on the first days of April and October of each and every year upon the presentation and surrender of the annexed coupons as they severally became due, and so long as the principal remains unpaid. When this action was brought the bonds had not matured, but they became due and payable October 1, 1900, and the principal of each bond bears interest from that date. The decree of the Circuit Court allowed interest upon the undetached coupons. This is excepted to upon the ground that the principal and interest is made payable in New York. The doctrine of the New York courts seems to be that interest upon interest is not allowed under the law of that state, but that an exception exists growing out of the character and purpose of interest coupons upon commercial obligations, 'when they become separate and independent instruments.' Williamsburgh Savings Bank v. Town of Solon, 136 N. Y. 465, 32 N. E. 1058 (decided in 1893), in which it was held that until they do, this exception from the general rule

[fol. 144] has no application. When they do,' said the Court, 'the exception is for the first time needed and for the first time applies. Until they do the promise is merely to pay interest and is governed by the usual rule. They do not become separate and independent instruments until they are utilized as such.' "

The Court here uses the language then of interest on interest. Judge Patterson uses the words "simple interest," but in the Interborough case it was interest on coupons, and in this case it was interest on coupons, and I am unable to discover the difference between the two.

I believe that is all I have to say.

The Court: One thing that is clear about it is that Judge Lurton here in the Sixth Circuit interpreted the law as announced in the Williamsburgh case one way, and Judge Patterson, a New York judge, interpreted it another way.

Mr. Bowers: That may be true, Your Honor. I might say——

The Court (Interposing): Now, Judge Lurton's interpretation of the New York law does not bind this court, for it happens to be an interpretation by the Sixth Circuit.

Mr. Bowers: No.

The Court (Continuing): This court would probably be more persuaded by a New York court decision made by a New York judge who directed his decision to a careful analysis of the New York cases. Judge Lurton's discussion of the New York cases does not seem to me to be as thorough an analysis of them as Judge Patterson's. Does it to you?

Mr. Bowers: Your Honor, I don't agree with you in that respect. I think Judge Lurton went into it more fully than Judge Patterson.

The Court: I surmised that you would not when I asked the question.

That opinion by Judge Lurton was very interesting and conflicted with Judge Patterson's opinion, and I studied it with considerable care. He kept on referring to a New York statute of interest on interest. If there is any statute [fol. 145] other than the general usury statute which fixes public policy, I could not find it; did you?

Mr. Bowers: Some cases refer to it.

The Court: To what?

Mr. Bowers: To the New York statute.

The Court: What statute? Did you ever find a statute in New York that referred to interest on interest or to compound interest?

Mr. Bowers: I examined the statute.

The Court: I was interested in finding out whether there was any specific statute in New York bearing on the point, because of the reference to it in Judge Lurton's opinion, which I found interesting, referring to the statute; but I could not find anything. I found cases referring to "the statute," but apparently the statute referred to was the usury statute, which was regarded as fixing public policy, which would reach into such enormous accumulations of interest as would result in the compounding of interest at certain due dates of interest on due dates indefinitely. That is all I could find in any manner referring to it. If there is any other statute, probably some of the rest of you gentlemen have it.

Mr. Bowers: I will say that I did copy part of it, of that statute. I don't believe I have it with me.

The Court: What statute?

Mr. Bowers: The New York statute with reference to usury.

The Court: Oh, yes, to usury.

Mr. Bowers: I don't pretend to try to repeat that to the Court.

The Court: It doesn't say anything about compound interest one way or the other, does it? It is just the general usury statute, isn't it?

Mr. Bowers: I think it has something to say about compound interest too.

The Court: There are some New York lawyers here.

Mr. Hand: As far as I know, the only statute is that which prohibits more than six per cent interest, but that refers only to the borrower and has no relation to the transaction of the kind under discussion here. I know of no [fol. 146] statute of any kind on the question here, except that one.

Mr. Jaques: May I clear it up a little?

The Court: Yes.

Mr. Jaques: The corporations in New York do not apply usury. The legal rate of six per cent on loans to individuals, but there is an exception to that. On demand secured borrowings from a bank or other lender the rate can be whatever it is stipulated; so a corporation cannot

plead usury to persons borrowing over five thousand dollars on demand loans secured by collateral, cannot plead usury.

Mr. Hand: There is no other statute, no.

Mr. Jaques: There is no other statute.

The Court: Mr. Jaques, I will be very glad to have your comments, if you desire to make any in view of Judge Patterson's attack on the New York law in reference to interest on interest, on compound interest.

Mr. Jaques: I think these views are entirely clear. I might add this for what it is worth: I might say that all who have prepared these papers have followed that view, and if I am not mistaken, Judge Clancy whose decision was referred to here a few moments ago as saying that there was only a difference in quantity not in quality, continued in that very exception, rather in that very opinion and said:

> "So we accept the policy as we find it. Erie R. Co. v. Tompkins, supra. The payment of interest on the coupons of bonds of a large issue generally distributed, Williamsburgh Savings Bank v. Solon, 136 N. Y. 465, 3, N. E. 1058; American Brake Shoe & Foundry v. Interborough Co., D. C., 26 F. Supp. 954, constitutes an exception in the sense that the policy does not there apply."

So, as I read, you have not only Judge Patterson but another New York Judge accepting the Brake Shoe case.

The Court: Yes, he regards the Brake Shoe case as an exception, but it is not the basis of Judge Patterson's ruling.

[fol. 147] Mr. Jaques: No, Judge Patterson went off on that point.

The Court: He approved it on its merits.

Mr. Jaques: Yes.

The Court (Continuing): But Judge Clancy regarded that Judge Patterson added an additional exception.

Mr. Jaques: There is a distinction in my mind between compound interest and simple interest. Judge Patterson readily says this is simple interest, interest on a thousand dollars at the rate of six per cent; just that statement. If that isn't simple interest, Your Honor, I must confess that I don't know what simple interest is; but if the thousand

dollars is in a savings bank and you get six per cent interest on the first six months and then add that on to the principal and get interest on that, it is compound interest. One is simple and one is compound interest, and I think Judge Patterson is entirely right in his analysis of the situation and it is generally accepted by all of the New York Bars that I know of. One is simple interest and the other is compound interest, and I know of no other way to describe it, Your Honor.

The Court: Do any of the rest of you gentlemen want to comment upon it?

Mr. Browning: If Your Honor please, while the New York law controls in the case, it might be of interest to call attention to the fact that the Kentucky Court of Appeals has adopted the principle of it in the Williamsburgh case of Judge Patterson, said that interest on coupons is not compound interest, and they quote there at length from Cyc; and the conclusion of the Kentucky Court are in exact accord with the conclusion reached by Judge Patterson.

The Court: I have this comfort, gentlemen—if anybody disagrees with my views, there is a place to have them corrected, and I hope any disagrement that appears to be quite sharp and that involves so much money as Mr. Bowers indicates is involved here, may cause some of you who are sufficiently interested to have my conclusion on this question reviewed, because it is an important matter to be settled. I think I have already said enough to indicate to you that after a very interesting study of the conflicting [fols. 148-157] views as between Judge Patterson and Judge Lurton as to what the law is in New York and under the New York authorities, I reach the conclusion that Judge Patterson's views correctly state the law as best we can derive it from the opinions of the New York courts, and that is, that coupons bear interest, simple interest, especially where the indenture securing them provides for it, from their maturity at the rate provided in the agreement, at least to the extent that the security is sufficient to meet it.

Now, if we got down to the question of where there were some free assets, surplus assets, we might meet a different question, but so far as the security is sufficient, the parties who are entitled to resort to that security for their debt, are entitled to receive and be paid not only simple interest on the principal but simple interest on past due coupons,

whether they are detached or attached in this case, by virtue of the agreement to pay that interest.

That is my idea about it and you can incorporate that in the order, and if there is to be any appeal here, I hope it will be taken so that before the matter may be disposed of finally we may have a decision on it.

Mr. Apisdorf: Your Honor, I don't wish to intrude, but I would like to know whether you would limit your ruling to just up to the date of the filing of the petition, or make it more inclusive.

The Court: What do you mean by up to the date of the filing of the petition?

Mr. Apisdorf: There is the doctrine in bankruptcy that as to interest and principal on claims, that interest stops running upon the filing of the claim, on the filing date.

The Court: No, it bears interest until paid.

Mr. Apisdorf: Until it is paid?

The Court: Until the effective date of the reorganization plan. I don't think there is any such bankruptcy rule as you have indicated. In fact, I think as far as the securities are sufficient, you cannot take away a man's security until you have paid him his full debt. Interest and principal have equal rights against security. Anyhow, that is my view of it.

[fol. 158] Re: Classification of Kentucky Fuel Gas Company Creditors

* * * * * * *

[fol. 159] Mr. Davis: Judge, there was one matter that I was not entirely clear on in connection with the classifi-
[fol. 160] cation of Inland claims. Would it be proper to include in that order a direction to the trustee to file a recommendation on his report of claims to be allowed or disallowed and to set out the facts as to the allowance or disallowance?

The Court: Yes, he might. That was stated yesterday, that after these claims have been proven the trustee will file a report of them, will file a report of the claims proven, that is if no other classification has been approved.

Mr. Clifford E. Smith: That is only after they have been classified and proven.

The Court: Yes, he cannot classify them until he knows that.

Mr. Davis: Does that include the Carbreath and Inland Gas Distributing Company?

The Court: Yes; all claims are to be proven and classified.

Mr. Davis: It is my understanding that proof of claim has already been filed, that proof of claim has already been filed as provided in the order.

The Court: If the proof of claim has already been filed as provided in the order, unless the proof of claim has already been filed, such as the Carbreath claim; if that has been filed, there is no use filing it again if the filing fulfilled all the requirements of this new filing; you have nothing to file; merely call it to the attention of the trustee and communicate with him about it.

Mr. Clifford E. Smith: The Carbreath claim is not of such nature as to require disclosure.

The Court: The Carbreath claim is not of such nature as to require disclosure?

Mr. Clifford E. Smith: No, sir.

The Court: But just how it has been filed, I don't know. You had better examine the record, because I want the trustee to report and classify all claims. Of course the importance of reporting the first mortgage claims as you get them, you ought to do that, because of the prospect of an early distribution, first reporting the first mortgage claims. By early, I don't mean very early really, but those claims ought to be reported so that they may be excepted to on other grounds besides the classification. You can file a [fol. 161] partial report of claims and classifications perhaps, but before you would be called upon to submit to creditors a plan you would have to file a supplemental or amended report of claims. The immediate necessity is to present these claims represented by first mortgage holders. The rest of them may never be of any consequence, but still they may. There may be some free assets ultimately or some surplus assets embraced in the mortgage. Mr. Logan may recover some damages. It just occurred to me in thinking over that proposition that we had in connection with the Delaware suits, that I think it would be worth considering, that it would not be prudent to dismiss that suit, not have it dismissed until after the Columbia case is finally determined, because if the Appellate Courts should ultimately say that the only remedy for that sort of misconduct was damages, and that that remedy cannot be disallowance in this situation, we would be out of luck

if we dismissed our damage suit. We would not even have anything to compromise on. So I think that is one good reason, if we have no other, for keeping that suit alive until the Columbia case is finally settled. If we have to keep it alive by trying it, we had better do that. I don't think, however, in view of all the circumstances, that the District Court out there would be in such impatient disposition as to force us to do that.

Your suggestion yesterday that a pre-trial conference might solve some of the questions would be a good one. Mr. Logan is not here. I think it is important.

Mr. Hand: No, sir, but we can get him here in a moment.

The Court: No; that didn't occur to me until after our discussion of the matter, but I think it is further justification for not taking any steps disposing of that case at present.

Mr. Hand: I shall report to him what Your Honor has stated, so that he will know what you have in mind.

Mr. Odenweller: There is one last point raised in our brief which has not been touched on yet, and that is the allocation here between the principal and interest.

The Court: I thoroughly agree with you that there should [fol. 162] not be any allocation.

Mr. Odenweller: But that the matter should be taken care of in any subsequent orders.

The Court: Yes.

Mr. Odenweller: I think this order should contain——

The Court (Interposing): If you think that is necessary, you can embrace that in an order.

Mr. Clifford E. Smith: It seems to me that that would be proper when the order of distribution is entered, rather than now.

Mr. Odenweller: Oh, that is right, when the order of distribution is entered. It is the last clause.

Mr. Clifford E. Smith: But the order of distribution is not to be entered until the other conditions are complied with.

Mr. Davis: There was just one other little detail in connection with yesterday's proceedings, if the Court please; Mr. Bowers filed the response to the trustee's classification in which he filed a response to certain factual matter. It seems to me that that ought not to go unresponded to. It seems that that should not go undenied. It

occurs to me it's hard to handle—it is a great responsibility—without prejudice to his right to question or raise more questions upon the sufficiency of the proof of the report of claims to be filed.

The Court: Well, the only responsibility I have in mind—his contention in part is sustained, though not on the merits of his claim, because in making his classification I held that it was not proper at this time to put any specific claim under a classification.

Mr. Davis: He wanted to put one specific claim out of this class.

This Court: He objected to a statement that the gold notes of American and the debentures were sustained by an equal—that they ought to be in class two; that they ought to be on a parity. That was the basis of his objection. He said—he stated the reason for his objection, because he thought there was some other reason. If the order can be drawn so as to recite that in so far as he objected to any specific statement, those statements are [fol. 163] stricken from the classification, that might be done.

Mr. Clifford E. Smith: The Court indicated yesterday that the proposed classification of the petition would be followed only to the extent of designating generally the claim.

The Court: That is right.

Mr. Clifford E. Smith (Continuing): Where that part of the statement in the petition would be omitted from the classification so that that would leave nothing in controversy between the two and nothing at issue until the claims are——

The Court (Interposing): To the extent that Mr. Bowers' response or objection went to that, his objection was sustained. I see no reason for making any specific order on it; do you, Mr. Bowers?

Mr. Bowers: I don't at this time.

The Court: I think an order fixing the classification in general terms only has the effect of ruling on the objection without specifically ruling on it. If you want to say that that does not constitute a ruling on the merits of Mr. Bowers' objection insofar as he undertakes to assert a lack of parity between those two claims but merely affects the broad statement of the general classification——

Mr. Clifford E. Smith (Interposing): Put in the order that nothing in the general classification shall be construed as——

The Court (Interposing): Passing on the merits.

Mr. Clifford E. Smith: As passing on the merits of any claim referred to.

The Court: I think we can embrace in the order a statement that will protect that feature.

Mr. Bowers: I understand, Your Honor, that the classification made by the trustee originally stands, that that is a matter of record, and that we have a new classification which the trustee is going to make——

Mr. Clifford E. Smith (Interposing): No, the trustee merely recommended a classification. The Court by his order makes a classification.

The Court: That is right.

Mr. Clifford E. Smith (Continuing): Which leaves out [fol. 164] the individual claims mentioned in the trustee's petition.

The Court: The trustee's report is accepted, the classification he recommended, only insofar as it is a general classification. Insofar as certain things are omitted from this or that or properly joined in another, that is excluded.

Mr. Bowers: That will be taken care of in the order?

Mr. Clifford E. Smith: Yes.

The Court: The order will recite the classification that the Court will make.

Mr. Bowers: The classification that the trustee has made will not be affirmed by the Court?

The Court: No, I have not affirmed it, but it will read upon consideration and hearing the Court makes the following classification.

Mr. Davis: The only thing is I don't want to be in a position of having to plead to the response as filed and also to plead again to the exceptions to the claim when the trustee makes his report on claims, and I am wondering if it would be satisfactory to put into the order which is to be entered—if Mr. Bowers would be willing to withdraw his response. I just don't want to get this factual matter in the record not passed upon or undenied at this time.

Mr. Bowers: It is in the record.

The Court: I think there would be no reason for not making the order overruling the objection, and then go

ahead and make the exception. I overrule the objection. The effect of making the classification gives him all the relief that he is entitled to at present. So, Mr. Bowers, that will simply be an overruling, and then following it with that classification that you do not object to.

Mr. Davis: In other words, that overruling of Mr. Bowers' objection embraces exceptions to the trustee's report without prejudice to his rights, to the trustee's rights to present our claims?

The Court: No, it is merely offered; no use putting in a lot of "without prejudice." because he hasn't done anything here except file objections to the classification. That certainly could not prejudice him in any other respect. Just say all other objections are overruled, but the Court strikes out of the classification all except the general terms [fol. 165] and makes the following classification, which will be the classification under which the classification will be made.

Mr. Davis: I desire to submit to the Court a bar order on little Inland and Carbreath claims that the Court referred to this morning.

The Court: I will give you that, Mr. Smith, and let you check it and if it meets with your approval it may be entered. Somebody may want to suggest some modification of it. I won't take time to examine it if the other parties in interest have no further suggestions.

I want to make this suggestion, that in preparing the orders dealing with this thing, that the order in respect to the proof of claims and disclosures be by separate order, because in all probability you will want to print that order on the back of your proof forms, and unless you have it in a separate order you will probably have only a partial order and it may be that in some other respects some features of the rulings ought to be in a separate order. As you take them up one at a time, gentlemen, you might consider that.

I would like, gentlemen, if you all feel disposed to do so, that we stay here and get up these orders. I have an idea that that is not very agreeable, but the only alternative that I think would serve would be for the trustee and his attorney and maybe Mr. LeWright Browning, who is close by, to work out some orders and submit them around before they are submitted to the Court, so that there may be an opportunity for other suggestions.

Mr. Browning: Can't we agree upon a date, not with the idea of coming back, when the orders, as Your Honor has indicated, shall be settled?

The Court: Yes.

Mr. Browning: And then in the meantime all counsel could be circularized with that order and if they had any objections they could indicate them to Your Honor.

The Court: I will tell you what I suggest, instead of agreeing on a date and meeting and drawing all the orders —the substance of the orders has been made a matter of record here; when the order has been prepared, or when the various orders have been prepared by the trustee and [fol. 166] his counsel, with your assistance, or anybody else who will assist in the original drafting, just send them out with a statement that on a certain date "I am going to submit this to the Court unless I hear from you with some criticism." Mr. Odenweller will probably come in in advance of that. I hope he will make some arrangements to co-operate with the trustee and his counsel, but I believe that will be left to you all, gentlemen.

Mr. Browning: In other words, all counsel will have an opportunity to see the draft of the orders before they are entered?

The Court: I would much prefer that all counsel have an opportunity to see the draft of the orders before they are entered. They will be entered as of today, I guess.

Re: Colloquy as to Distribution of Funds in the Hands of the Inland Gas Corporation Trustee; and Bar Order Tendered by Counsel for the Trustee of Little Inland and Carbreath in Connection with the Claims of Little Inland and Carbreath and the Green and Lilienthal Committees against Inland Gas Corporation

The Court: That proposition leaves the petition or the application for distribution undisposed of. It occurs to me that we might merely enter an adjourning order on this application to the various responses, to a definite date and set it far enough ahead so that in the meantime we might have an opportunity to dispose of enough of the questions here so as to reach a definite conclusion as to whether or not there ought to be a distribution. Of course, in the meantime if there is an appeal taken from the rulings, we will know it, and we will just call off the matter

until those things are disposed of. Would you rather do that or enter these orders and leave the matter open subject to call?

Mr. Browning: If Your Honor please, I would rather adjourn this hearing over to a near date when these mat- [fol. 167] ters can be settled, if there is any disagreement about them, so that we will not have to go through the matter of sending out notices for the settlement of the orders.

The Court: I don't think we will have to send out notices for the settlement of the orders.

Mr. Browning: I don't think so either.

The Court: Within what time can we make an adjournment to? Say, thirty days?

Mr. Browning: Two weeks; I don't mean with the idea of dragging anybody back.

Senator Bulkley: Your Honor set April 29th to take up a preliminary matter in connection with the income tax question.

The Court: All right; let's set it for April 29th.

All the order that we may need to enter today, gentlemen, is that the Court not having concluded the hearing on the application and the responses on the questions presented, the matter is continued for further hearing at ten o'clock at Lexington on April 29th. By that time we will have everything ready to go in, I hope.

Mr. Rouse, will you prepare that order? It is a very simple order.

Mr. Rouse: I will, Your Honor.

(Reporter's Note: Mr. Davis had heretofore, as shown on page 165 hereof, tendered for filing a bar order on Little Inland and Carbreath claims. At this point Mr. Smith stated with reference to said tendered bar order of Mr. Davis.)

Mr. Clifford E. Smith: In view of the fact that the other orders are to be passed around, I suggest to Mr. Davis that this order be withheld until the other orders are entered.

The Court: All right; take it along with you, Mr. Smith, and incorporate it with the other orders, unless there is some reason for not doing it. Mr. Davis wants this order entered because he feels that it is a matter that

ought to be brought immediately to some sort of a conclusion. Here is the order that has been presented:

The Court (Continuing).

[fol. 168] "It appearing to the Court that Louis A. Green and Robert Heilbrunn, as Committee for American Fuel & Power Company Note Holders, and Morris Green, a Creditor in the Inland Gas, and Kentucky Fuel Gas Proceedings, have filed a response to the application of the Van Horn Committee for distribution to the First Mortgage Bondholders of the Inland Gas Corporation, in which response it is asserted that there exists valid claims in favor of the Inland Gas Distributing Company and Carbreath Gas Company arising during the course of the bankruptcy proceedings, and prior thereto, out of unreasonable and inequitable prices paid by Inland Gas Corporation to Carbreath Gas Company for the latter's natural gas and out of prices at which natural gas was sold by Inland Gas Corporation to Inland Gas Distributing Company and resulting in the loss of substantial sums of money to Inland Gas Distributing Company and Carbreath Gas Company, and it further appearing to the Court that the validity of and the amount of said claims should be determined before any distribution is made to the First Mortgage Bondholders of Inland Gas Corporation, it is therefore ordered that Clinton M. Harbison, as Trustee of Inland Gas Distributing Company and as Trustee of Carbreath Gas Company, and Louise A. Green and Robert Heilbrunn, as independent committee for the American Fuel & Power Company Note Holders, and the Lilienthal Committee for the American Fuel & Power Company Note Holders, be and they are hereby given sixty days from this date to file in the Inland Gas Corporation case any claim or claims which they assert on behalf of the Carbreath Gas Company and Inland Gas Distributing Company arising out of the prices paid by Inland Gas Corporation to the Carbreath Gas Company for the latter's natural gas and out of prices at which natural gas was sold by the Inland Gas Corporation to the Inland Gas Distributing Company either during the course of the bankruptcy proceedings, or prior thereto,

and in, the event of failure to file such claims within [fol. 169] sixty days, it is ordered that such claims be forever barred as claims against the estate of Inland Gas Corporation, a debtor in these proceedings."

Mr. Browning: If Your Honor please, I would certainly object to one little sentence in there. I don't know whether it was inadvertently put in or not, but it is the phrase "prior thereto."

Mr. Davis: Mr. Browning, the principal reason that that was put in the order was because of the response of the Green Committee making that claim.

Mr. Browning: I know, but I don't want an adjudication of this Court to be hereafter treated as in any way a determination of a limitation on the time for filing claims.

The Court: I don't think the order would change anything if he has got any claim.

Mr. Browning: I don't think he ought to be given leave, if Your Honor please; that is the point; I don't think he ought to be given leave to file the claim itself based on anything that occurred before the reorganization proceeding.

Mr. Davis: It certainly seems to me——

The Court (Interposing): You can't keep a man from filing a claim even though it is barred.

Mr. Browning: He can tender it?

The Court: Yes.

Mr. Browning: He can tender it but I don't think he can file it, that he ought to be given leave to file it.

The Court: He may have some defense of some character. After all limitation in equity is a matter of laches. I don't think it would preclude the merits of any claim at all by merely calling on him, that if have any claim you must present it, in order that the merits of it might be reached. I don't think there is any serious trouble about that. Do you, Mr. Browning? It doesn't strike me so.

Mr. Browning: I just didn't know what construction might be put on that hereafter, if Your Honor please.

The Court: You have this advantage; the Reporter is taking down your objections, and the construction I am putting on it now doesn't qualify anything except as an [fol. 170] assertion of proof of any claim you have without implying that you have any claim or that you have any meritorious claim of any character. That is not included

in it. It carries no such implication; it is not intended to do so or to include any proper defense to any claim you have to a legal defense or an equitable defense of any character.

Mr. Browning: With that statement in the record, I have no objection.

The Court: With that statement in the record I don't suppose that anybody could misinterpret the order. In view of the fact that Mr. Davis has prepared and submitted this order and that it seems to meet the point, I am going to let that remain a part of the procedure and filed.

Mr. Clifford E. Smith: The only point is whether or not it is not too restrictive, is not broad enough to take care of the claims asserted.

The Court: The only thing that I see that could have been added was that the claim is between Kentucky Fuel and Inland.

Mr. Clifford E. Smith: Well, Kentucky Fuel is not included in the response, so I wanted to ask why.

The Court: It is included in the response as another type of claim against Inland.

Mr. Davis: That does not affect the Carbreath? That is the only thing I am interested in.

The Court: It affects Green.

Mr. Browning: That was not a statement but a mere suggestion. I don't think that ought to be dignified by an order.

The Court: It is a pleading.

Mr. Davis: If the Court please, the question between the Kentucky Fuel and the Inland is a matter of personal agreement. The matters involved in this order with reference to the trustee of Carbreath are proper claims of Carbreath. That is the only thing I want an order on, so that they may advise me of any matters that they know of, so that they may advise me if they know of any facts leading up to or that it is necessary to include in it.

The Court: I don't think that is important, or that it is necessary to include that in it. It would enhance the [fol. 171] value of the properties of Inland instead of reducing it.

Mr. Clifford E. Smith: It would enhance the value of the Kentucky.

The Court: That is right.

Mr. Clifford E. Smith: I don't think his pleading is strong enough to justify——

The Court (Interposing): Yes, that is right. It is a mere suggestion that the Court may do that. I won't pay any attention to that. I don't think it is worth dealing with. I know of no reason why that should be an obstruction to anything.

You may enter this order, Mr. Clerk. I don't know how many copies are needed.

Mr. Davis: I made up fourteen copies, if Your Honor please.

The Court: Who is going to prepare the type of order that is to be entered today? Will you prepare that, Mr. Smith?

Mr. Clifford E. Smith: The order——

The Court (Interposing): The order passing the case for further consideration until the 29th of April.

Mr. Clifford E. Smith: Yes, I will.

The Court: I think you might recite the fact that the Court having indicated his conclusions, which are embraced in the Reporter's record—I don't want to have to go over this.

Mr. Clifford E. Smith: We may dictate it here.

The Court: You have got it in the record. This might not be transcribed. You had better prepare it.

Anything further, gentlemen? If not, we will recess until the 29th day of April, Saturday at ten o'clock.

I might call attention to the fact, Mr. McConaughy, I suppose you received notice that on the 20th of April there are some matters here involving a petition and exception to an option on your Carbreath lands.

Mr. McConaughy: Yes, I wanted to get in touch with Mr. Harbison and Judge Stoll on the theory that I won't have to be here.

Judge Stoll: Take it up with Mr. Davis. I will be up in Cincinnati next week in the tobacco case, but Mr. Davis [fol. 172] will attend to it.

The Court: I suppose he can.

Judge Stoll: I know he can.

This ended the hearing and Court was here adjourned at 3:30 P. M. on Wednesday, April 12, 1944.

I, Harry G. Bright, Official Reporter of the United States District Court for the Eastern District of Kentucky,

certify that I took down in shorthand on April 11th and 12th, 1944, in the United States District Court at Lexington, a hearing before His Honor, Judge H. Church Ford, Judge of said court, in case styled In the Matter of American Fuel & Power Company, Debtor, In Bankruptcy No. 115, and companion cases styled, In the Matter of Inland Gas Corporation, Debtor, In Bankruptcy No. 989-B, and In the Matter of Kentucky Fuel Gas Corporation, Debtor, In Bankruptcy No. 991-B, on the application of certain creditors of the Inland Gas Corporation for a distribution of funds in the hands of the Trustee of said Inland Gas Corporation, and on the said Trustee's Petition for Advice, on objections to said distribution, and on various reports and petitions, and I certify that the foregoing constitutes a true, full and accurate printing of said hearing.

In Testimony Whereof, Witness my official hand, on this 29th day of April, 1944.

Harry G. Bright, Official Reporter, U. S. District Court, Eastern District of Kentucky.

[fol. 173] Original.

1. "Statement of or report by W. E. Lockhart as Receiver in equity as to the asset and liability or financial position of Inland Gas Corporation as at December 2nd or 3rd, 1930 duly filed herein."

Inland Gas Corporation

BALANCE SHEET AS OF DECEMBER 2, 1930

ASSETS

Fixed Capital:			
Property, Plant and Equipment		$7,701,360.68	
Less: Accrued Depreciation, Depletion and Amortization		894,839.10	$6,806,521.58
Investments:			
Capital Stock of American Fuel and Power Company			38,500.00
Current and Working Assets:			
Cash in Bank and on Hand		4,297.27	
Accounts Receivable—Customers		87,519.26	
Accounts Receivable—Affiliated Companies		45,943.46	
Accounts Receivable—other		19,038.19	
Supplies—General		79,858.68	236,656.86
Sinking Fund Deposits—Cash			12,700.00
Deferred Charges:			
Unamortized Debt Discount & Expense, Prepaid Items and Other Deferred Charges			784,388.37
Total Assets			$7,878,766.81

LIABILITIES

Capital Stock			$2,126,587.00
Funded Debt:			
First Mortgage 6½% Bonds, due February 1, 1938		4,254,700.00	
Ten Year 7% Debentures, due February 1st, 1938	1,450,000.00		
Second Mortgage Notes 6½% due Feb. 1, 1938	400,000.00	1,850,000.00	6,104,700.00
Current and Accrued Liabilities:			
Accounts Payable		60,361.76	
Accounts Payable—Affiliated Companies		390,835.28	
Notes Payable		15,000.00	
Accrued Taxes		5,377.17	
Accrued Interest on Funded Debt:			
Payable February 1, 1931 on First Mortgage 6½% Bonds, due February 1, 1938	93,665.37		
On Ten Year 7% Debentures, due February 1, 1938	34,375.34		
On Second Mortgage Notes, due Feb. 1, 1938			
Payable: Feb. 1, 1930 2,000.00			
Aug. 1, 1930 12,000.00			
Feb. 1, 1931 8,133.33	22,133.33	150,174.04	616,724.91
Chatham Phenix National Bank & Trust Company and James F. McNamara, Trustees (Advances under Section 16 of Article 5 of Mortgage dated Feb. 1, 1928)			241,991.76
Surplus:			
Earned Surplus		1,445,032.31	
Surplus by Appreciation		233,795.45	1,211,236.86
Total Liabilities			$7,878,766.81

fol. 174] Original

[2: "Statements or comparative statements of profit and loss surplus of Inland Gas Corporation (combined accounts of corporation, receiver and trustee) covering the period from May 6th, 1927 to and including December 31st, 1943."

COMPARATIVE STATEMENT OF PROFIT AND LOSS—SURPLUS
Inland Gas Corporation

(Combined Accounts of Corporation, Receiver and Trustee)
1927-1928-1929

	May 5 to December 31 1927	January 1 to December 31 1928	January 1 to December 31 1929
Gross Revenues—Gas:			
Industrial	$	243,284.30	800,004.01
Wholesale	97,530.17	260,439.82	145,335.17
Other	1,504.08	6,977.52	
Total Sales to Public	$ 99,034.25	510,701.64	945,339.18
Sales to Associated Companies			78,939.60
Total Revenues—Gas	$ 99,034.25	510,701.64	1,024,278.78
Operating Expenses:			
Gas Purchased from Associated Companies	$	9,324.12	8,880.43
Gas Purchased from Others		144,795.24	475,954.88
Total Gas Purchased		154,119.36	484,835.31
Purchased Gas Expense—Operation	$		4,532.92
Purchased Gas Expense—Maintenance			
Production—Operation	2,087.39	137,219.99	74,940.79
Production—Maintenance	9,642.79	15,783.89	10,018.10
Transmission—Operation	6,352.39	41,919.79	58,888.54
Transmission—Maintenance	3,188.42	9,205.97	11,206.04
Distribution—Operation		5,096.24	2,864.45
Distribution—Maintenance			365.54
Commercial			
Business Promotion		208.75	3,860.85
General—Operation	31,868.96	83,335.30	83,571.27
General—Maintenance	608.51	203.05	171.71
Gas Used in Operation			
Total Operation	$100,308.74	421,899.43	713,494.13
Total Maintenance	13,439.72	25,192.91	21,761.39
Total Operation and Maintenance	$113,748.46	447,092.34	735,255.52
Depreciation, Depletion and Amortization	29,833.80	203,401.96	211,048.69
Taxes	5,132.75	4,455.78	66,248.62
Total Expenses	$148,715.01	654,950.08	1,012,552.83
Net Operating Revenue—Gas	$ 49,680.76	144,828.44	11,725.95
Miscellaneous Revenues	862.74	15,672.17	1,206.43
Total Net Operating Revenue	$ 48,818.02	128,576.27	12,932.38
Other Income	1,562.49	38,785.99	2,121.34
Gross Income	47,255.53	89,790.28	15,053.72
Other Deductions:			
Rental Leased Pipe Lines	$		
Interest on 1st Mtge 6½% Bonds, dated 2/1/28		122,364.37	285,813.11
Interest on 10 Yr. 7% Debentures, dated 2/1/28		83,444.19	104,938.74
Interest on 6% Mortgage Notes, dated 1/2/30			
Other Interest	2,805.33	5,887.20	17,921.98

Original—Continued

2. "Statements or comparative statements of profit and loss surplus of Inland Gas Corporation (combined accounts of corporation, receiver and trustee) covering the period from May 6th, 1927 to and including December 31st, 1943."

COMPARATIVE STATEMENT OF PROFIT AND LOSS—SURPLUS

Inland Gas Corporation

(Combined Accounts of Corporation, Receiver and Trustee)
1927–1928–1929

	May 5 to December 31 1927	January 1 to December 31 1928	January 1 to December 31 1929
Discount & Expense, 6½% Bonds & 7% Debentures	.....	8,094.68	12,142.08
Interest on 7% 1st Mtg. Bonds, dated 4/1/27	45,888.90	17,449.99	.....
Discount on 7% 1st Mtg. Bonds, dated 4/1/27	10,714.32	89,285.68	.....
Premiums on 7% 1st Mtg. Bonds, dated 4/1/27	.....	50,000.00	.....
Total Other Deductions	$ 59,408.55	376,526.11	420,815.91
Net Income	$106,664.08	466,316.39	405,762.19
Miscellaneous Credits to Surplus	.....	.....	.....
Miscellaneous Charges to Surplus	5,045.30	25,232.35	29,188.94
Net to Surplus	$111,709.38	491,598.74	434,951.13
Earned Surplus at Beginning of Period	.....	111,709.38	603,308.12
Earned Surplus at End of Period	$111,709.38	603,308.12	1,038,259.25

[fol. 175]

COMPARATIVE STATEMENT OF PROFIT AND LOSS—SURPLUS

Inland Gas Corporation

(Combined Accounts of Corporation, Receiver and Trustee)
1930—1931—1932

	January 1 to December 31, 1930	January 1 to December 31, 1931	January 1 to December 31, 1932
Gross Revenues—Gas:			
Industrial	$ 663,460.63	439,941.89	393,049.54
Wholesale	171,066.18	120,598.17	66,886.95
Other			
Total Sales to Public	834,526.81	560,540.06	459,936.49
Sales to Associated Companies	148,930.80	90,699.21	62,396.67
Total Revenues—Gas	983,457.61	651,239.27	522,333.16
Operating Expenses:			
Gas Purchased from Associated Companies	64,461.88	41,416.36	92,334.40
Gas Purchased from Others	298,896.31	208,749.32	57,440.24
Total Gas Purchased	363,358.19	250,165.68	149,774.64
Purchased Gas Expense—Operation	3,004.25	3,232.54	1,586.32
Purchased Gas Expense—Maintenance			
Production—Operation	58,046.02	50,994.41	113,757.04
Production—Maintenance	21,059.06	17,664.80	4,285.55
Transmission—Operation	45,287.77	35,054.17	19,930.36
Transmission—Maintenance	8,048.94	3,400.92	3,339.48
Distribution—Operation	3,749.85	2,919.73	1,464.92
Distribution—Maintenance	412.80	367.83	431.42
Commercial			2,011.03
Business Promotion	3,177.63	2,982.00	2,511.55
General—Operation	68,054.18	59,184.23	54,779.99
General—Maintenance	5,323.59	6,121.08	1,318.16
Gas Used in Operation			3,782.18
Total Operation	554,677.89	404,532.76	339,633.67
Total Maintenance	34,844.39	27,554.63	9,374.61
Total Operation and Maintenance	579,522.28	432,087.39	348,408.28
Depreciation, Depletion and Amortization	256,019.20	211,113.20	210,060.01
Taxes	82,368.36	61,373.40	50,429.48
Total Expenses	917,909.84	704,573.99	608,897.77
Net Operating Revenue—Gas	65,547.77	53,334.72	86,564.61
Miscellaneous Revenues	1,353.66	14,433.41	712.95
Total Net Operating Revenue	66,901.43	38,901.31	85,851.66
Other Income	26,383.37	3,966.67	8,558.97
Gross Income	93,284.80	34,934.64	77,292.69
Other Deductions:			
Rental Leased Pipe Lines			100.16
Interest on 1st Mtge. 6½% Bonds, dated 2/1/28	279,924.92	276,555.48	
Interest on 10 Yr. 7% Debentures, dated 2/1/28	102,731.15	101,499.96	
Interest on 6% Mortgage Notes, dated Jan. 2, 1930	24,000.00	24,000.00	
Other Interest	23,793.96	44,665.50	834.00

COMPARATIVE STATEMENT OF PROFIT AND LOSS—SURPLUS
CONTINUED

Inland Gas Corporation

(Combined Accounts of Corporation, Receiver and Trustee)
1930—1931—1932

	January 1 to December 31, 1930	January 1 to December 31, 1931	January 1 to December 31, 1932
Gross Revenues—Gas:			
Discount and Expense 6½% Bonds & 7% Debentures	16,093.44	19,485.52	.....
Interest on 7% 1st Mtge. Bonds dated 4/1/27	.....	.....	.....
Discount on 7% 1st Mtge. Bonds dated 4/1/27	.....	.....	.....
Premiums on 7% 1st Mtge. Bonds dated 4/1/27	.....	.....	.....
Total Other Deductions	446,543.47	466,206.46	934.16
Net Income	353,258.67	501,141.10	78,216.85
Miscellaneous Credits to Surplus	1,750.53	43,255.21	599,163.23
Miscellaneous Charges to Surplus	180,693.52	120,432.39	141,331.59
Net to Surplus	532,201.66	578,318.28	379,604.79
Earned Surplus at Beginning of Period	1,038,259.25	1,570,460.91	2,148,779.19
Earned Surplus at End of Period	1,570,460.91	2,148,779.19	1,769,174.40

[fol. 176]

COMPARATIVE STATEMENT OF PROFIT AND LOSS—SURPLUS

Inland Gas Corporation

(Combined Accounts of Corporation, Receiver and Trustee)
1933—1934—1935

	January 1 to December 31, 1933	January 1 to December 31, 1934	January 1 to December 31, 1935
Gross Revenues—Gas:			
Industrial	543,367.32	632,788.28	876,739.60
Wholesale	53,499.65	36,660.48	1,194.12
Other	629.04	1,719.60	999.15
Total Sales to Public	597,496.01	691,168.36	878,932.87
Sales to Associated Companies	63,261.24	78,005.55	66,837.75
Total Revenues—Gas	660,757.25	769,173.91	945,770.62
Operating Expenses:			
Gas Purchased from Associated Companies	88,987.19	50,920.77	40,138.31
Gas Purchased from Others	33,683.36	62,845.82	87,027.89
Total Gas Purchased	122,670.55	113,766.59	127,166.20
Purchased Gas Expense—Operation	795.50	809.94	877.29
Purchased Gas Expense—Maintenance			
Production—Operation	111,815.61	122,152.61	120,360.87
Production—Maintenance	3,885.44	8,141.63	3,269.82
Transmission—Operation	16,753.88	30,999.29	39,664.45
Transmission—Maintenance	5,396.62	14,280.19	17,164.34
Distribution—Operation	1,193.09	1,587.21	1,793.39
Distribution—Maintenance	188.17	603.17	586.29
Commercial	1,200.73	803.87	844.32
Business Promotion	2,465.13	2,393.91	2,726.77
General—Operation	42,225.12	42,945.88	116,588.79
General—Maintenance	148.43	486.26	475.69
Gas Used in Operation	3,925.02	6,728.83	6,186.23
Total Operation	295,194.59	308,730.47	403,835.85
Total Maintenance	9,618.66	23,512.03	21,496.14
Total Operation & Maintenance	304,813.25	332,242.50	425,331.99
Depreciation, Depletion & Amortization	255,307.39	277,167.45	298,476.86
Taxes	42,699.37	49,578.32	58,453.46
Total Expenses	602,820.01	658,988.27	782,262.31
Net Operating Revenue—Gas	57,937.24	110,185.64	163,508.31
Miscellaneous Revenues	121.69	28.21	1,888.04
Total Net Operating Revenue	58,058.93	110,213.85	165,396.35
Other Income	10,906.70	17,508.96	24,440.30
Gross Income	68,965.63	127,722.8	189,836.65
Other Deductions:			
Rental Leased Pipe Lines	1,699.39	1,611.86	535.53
Interest on First Mtg. 6½% Bonds, dated 2/1/28			292,957.94
Interest on 10 Yr. 7% Debentures, dated 2/1/28			101,500.00
Interest on 6% Mortgage Notes, dated 1/2/30			24,000.00
Other Interest	834.00	834.66	24,655.62

[fol. 176]

COMPARATIVE STATEMENT OF PROFIT AND LOSS—SURPLUS

CONTINUED

Inland Gas Corporation

(Combined Accounts of Corporation, Receiver and Trustee)
1933—1934—1935

	January 1 to December 31, 1933	January 1 to December 31, 1934	January 1 to December 31, 1935
Gross Revenues—Gas:			
Discount & Expense 6½% Bonds & 7% Debentures			
Interest on 7% 1st Mtge. Bonds, dated 4/1/27			
Discount on 7% fist Mtge. Bonds, dated 4/1/27			
Premiums on 7% 1st Mtge. Bonds, dated 4/1/27			
Total Other Deductions	2,533.39	2,446.52	443,649.09
Net Income	66,432.24	125,276.29	253,812.44
Miscellaneous Credits to Surplus	9,705.05	7,832.67	6,212.70
Miscellaneous Charges to Surplus	219.75	6,203.60	1,877,398.57
Net to Surplus	75,917.54	126,905.36	2,124,998.31
Earned Surplus at Beginning of Period	1,769,174.40	1,693,256.86	1,566,351.50
Earned Surplus at End of Period	$1,693,256.86	1,566,351.50	3,691,349.81

[fol. 177]

Ben Williamson, Jr., Trustee of
Inland Gas Corporation

STATEMENT OF INCOME—PROFIT AND LOSS AND SURPLUS FOR PERIOD JANUARY 1 TO DECEMBER 31
YEARS 1936—1937—1938

	January 1 December 31, 1936	January 1 December 31, 1937	January 1 December 31, 1938
Gross Revenues:			
Gas Sales	$1,114,232.23	$ 969,911.29	$ 579,161.01
Other Revenues	5,992.19	5,386.54	13,212.49
Total Revenues	1,120,224.42	975,297.83	592,373.50
Operating Expenses:			
Gas Purchased	141,127.11	140,976.85	87,219.23
Purchased Gas Expense	2,083.68	1,919.82	2,287.05
	143,210.79	142,896.67	89,506.28
Production—Operation	127,769.90	124,824.86	111,670.14
Production—Maintenance	7,806.98	8,084.40	4,520.33
Transmission—Operation	52,290.51	38,423.14	31,366.96
Transmission—Maintenance	22,173.87	14,121.86	7,566.46
Distribution—Operation	1,556.84	1,563.09	744.36
Distribution—Maintenance	515.76	720.00	844.01
Commercial	748.82	849.37	797.68
Business Promotion	2,227.90	1,817.38	1,595.07
General—Operation	47,969.76	38,732.37	45,353.39
General—Maintenance	1,236.48	1,441.86	515.93
Gas Used in Operation	9,118.78	5,179.42	3,437.44
Total Operation	223,444.95	221,030.79	188,090.16
Total Maintenance	31,733.09	24,368.12	13,446.73
Total Operation and Maintenance	255,178.04	245,398.91	201,536.89
Depreciation, Depletion and Amortization	245,364.69	251,719.41	193,735.99
Taxes	71,430.44	74,932.41	59,800.03
Miscellaneous Expenses—Operation	190.69	168.15	3,176.83
Miscellaneous Expenses—Maintenance	1.22	46.04	1,608.50
Total Expenses	715,375.87	715,161.59	549,358.52
Net Operating Revenue	404,848.55	260,136.24	43,014.98
Other Income	32,288.68	38,818.26	23,411.92
Gross Corporate Income	437,137.23	298,954.50	66,426.90
Other Deductions:			
Interest on First Mortgage Bonds	276,555.50	276,555.50	276,555.50
Interest on Debentures	101,500.00	101,500.00	101,500.00
Interest on Second Mortgage Notes	24,000.00	24,000.00	24,000.00
Interest on Advances under First Mortgage	16,401.36	16,400.28	16,400.28
Interest—Affiliated Companies	24,652.92	24,652.92	24,652.93
Interest—Other	2.70	2.40	2.10
Total Other Deductions	443,112.48	443,111.10	443,110.81
Net Income	5,975.25	144,156.60	376,683.91

[fol. 178]

Ben Williamson, Jr., Trustee of
Inland Gas Corporation

STATEMENT OF INCOME—PROFIT AND LOSS AND SURPLUS FOR PERIOD JANUARY 1 TO DECEMBER 31
YEARS 1936—1937—1938

	January 1 December 31, 1936	January 1 December 31, 1937	January 1 December 31, 1938
Forwarded: Net Income	5,975.25	144,156.60	376,683.91
Miscellaneous Credits to Surplus:			
Adjustment—Inventory			9,440.34
Correction—Gas Sales—Prior Years	1,835.42	100.00	403.00
Sale of Fixed Capital Assets	589.41		
Cancel Reserve—Uncollectible Accounts	332.05	336.81	677.52
Adjustment—Operating Expenses	74,514.67		
Settlement—Lexington, Ky. Rate Case		15,735.68	14,074.65
Adjustment—Taxes—Prior Years			31,062.99
Profit—Sale U. S. Treasury Bonds			
Total Miscellaneous Credits	77,271.55	16,172.49	55,698.50
Miscellaneous Debits to Surplus:			
Loss—Sale U. S. Treasury Bonds		15,015.80	
Overpaid Lease Rentals Charged Off		168.69	
Uncollectible Accounts	410.60	11.20	196.56
Adjustment—Inventory		16,426.64	
Adjustment—Suspense Account			914.12
Unrecoverable portion of prepayments in 1928 to Hamilton Gas Company	70,000.00		
Adjustment—Taxes—Prior Years			
Property Abandoned	33,888.65	31,248.45	124,508.23
Adjustment—Depreciation and Depletion		162.27	2,196.24
Expenses—Drilling Test Well			748,659.56
Unamortized Debt Discount and Expense			
Total Miscellaneous Debits	104,299.25	63,010.65	876,474.71
Net to Surplus	33,602.95	190,994.76	1,197,500.12

[fol. 179]

Ben Williamson, Jr., Trustee of
Inland Gas Corporation

STATEMENT OF INCOME—PROFIT AND LOSS AND SURPLUS

1939

	January 1, December 31, 1939
Gross Revenues:	
Gas Sales	$794,942.12
Other Revenues	7,959.33
Total Revenues	802,901.45
Operating Expenses:	
Gas Purchased	82,012.11
Purchased Gas Expense	2,309.46
	84,321.57
Production—Operation	127,462.82
Production—Maintenance	6,498.29
Transmission—Operation	34,359.55
Transmission—Maintenance	8,013.72
Distribution—Operation	648.94
Distribution—Maintenance	784.95
Commercial	1,649.46
Business Promotion	4,373.23
General—Operation	59,081.50
General—Maintenance	1,074.64
Gas Used in Operation	2,495.64
Total Operation	225,079.86
Total Maintenance	16,371.60
Total Operation and Maintenance	241,451.46
Depreciation, Depletion and Amortization	248,211.20
Taxes	54,818.96
Miscellaneous Expenses—Operation	1,834.24
Miscellaneous Expenses—Maintenance	495.21
Total Expenses	631,132.64
Net Operating Revenue	171,768.81
Other Income	27,500.30
Gross Corporate Income	199,269.11
Other Deductions:	
Interest on First Mortgage Bonds	268,873.38
Interest on Debentures	101,500.00
Interest on Second Mortgage Notes	24,000.00
Interest on Advances under First Mortgage	16,400.28
Interest—Associated Companies	24,652.92
Interest—Other	3.10
Total Other Deductions	435,429.68
Net Income	$236,160.57

[fol. 180]

Ben Williamson, Jr., Trustee of
Inland Gas Corporation

STATEMENT OF INCOME—PROFIT AND LOSS AND SURPLUS

1939

	January 1, December 31, 1939
Forward: Net Income	236,160.57
Miscellaneous Credits to Surplus:	
Adjustment of Inventory	1,800.00
Correction—Gas Sales Prior Years	
Sale of Fixed Capital Accounts	
Cancel Reserve for Uncollectible Accounts	
Adjustment—Operating Expenses Prior Years	53.80
Settlement—Lexington, Ky. Rate Case	
Adjustment—Taxes Prior Years	
Profit—Sale U. S. Treasury Bonds	
Adjustment Depletion Reserves	69.36
Total Miscellaneous Credits	1,923.16
Miscellaneous Debits to Surplus:	
Loss—Sale U. S. Treasury Bonds	
Overpaid Lease Rentals Charged Off	616.90
Uncollectible Accounts	53.07
Adjustment—Inventory	
Adjustment—Suspense Account	
Unrecovered portion of prepayments for gas in 1928 to Hamilton Gas Company	
Undepreciated Cost of Property and Intangible Assets Retired	1,011,647.49
Adjustment—Taxes Prior Years	1,040.42
Amortization Unoperated Natural Gas Rights and Leaseholds, prior years	83,683.08
Adjustment—Depreciation and Depletion	
Expenses—Drilling Test Well	387.00
Settlement Hamilton & Pirley Gas Purchase Contracts	50,000.00
Unamortized Debt Discount and Expense	
Total Miscellaneous Debits	1,147,427.96
Net to Surplus	$1,381,665.37

[fol. 181]

STATEMENT OF PROFIT AND LOSS AND CHANGES IN SURPLUS

January 1, 1940, to December 31, 1940

Gas Operating Income:			
Operating Revenues			$854,064.27
Operating Revenue Deductions:			
Operating Expenses—			
Production Expenses	$193,287.94		
Transmission Expenses	28,448.45		
Distribution Expenses	837.71		
Customers Accounting and Collecting Expenses	1,681.10		
Sales Promotion Expenses	4,449.07		
Administrative and General Expenses	84,638.27		
Total Operating Expenses		313,342.54	
Depreciation		171,172.77	
Amortization and Depletion of Producing Natural Gas Land and Land Rights		456.22	
Taxes		52,531.64	
Total Operating Revenue Deductions			537,503.17
Net Operating Revenues			316,561.10
Exploration and Development Costs:			
Delay Rentals		51,797.70	
Abandoned Leases		9,081.06	
Total Exploration and Development Costs			60,878.76
Net Utility Income			255,682.34
Other Income:			
Interest on Securities Owned			18,750.31
Gross Income			274,432.65
Income Deductions:			
Interest on Mortgage Debt		325,316.92	
Interest on Debt to Associated Companies		48,652.92	
Other Interest Charges		5.65	
Miscellaneous Income Deductions—Contributions		582.50	
Total Income Deductions			374,557.99
Net Income			100,125.34
Miscellaneous Credits to Surplus		1,467.61	
Less: Miscellaneous Debits to Surplus		39,680.87	
Net Surplus Adjustment			38,213.26
Net Increase or Decrease in Surplus			138,338.60
Surplus at January 1, 1940			6,494,513.01
Surplus at December 31, 1940			$6,632,851.61

[fol. 182]

STATEMENT OF PROFIT AND LOSS AND CHANGES IN SURPLUS

January 1, 1941, to December 31, 1941

Gas Operating Income:			
Operating Revenues			$1,082,460.99
Operating Revenue Deductions:			
Operating Expenses—			
Production Expenses	$217,695.42		
Transmission Expenses	23,691.59		
Distribution Expenses	1,035.59		
Customers' Accounting & Collecting Expenses	1,927.33		
Sales Promotion Expenses	4,615.86		
Administrative and General Expenses	87,338.19		
Total Operating Expenses		336,303.98	
Depreciation		224,227.95	
Amortization and Depletion of Producing Natural Gas Land and Land Rights		8,310.56	
Taxes		54,755.34	
Total Operating Revenue Deductions			623,597.83
Net Operating Revenues			458,863.16
Exploration and Development Costs:			
Delay Rentals		58,777.89	
Abandoned Leases		6,120.40	
Non-Productive Well Drilling		14,603.17	
Other Exploration Costs		10.00	79,511.46
Net Utility Income			379,351.70
Other Income:			
Interest on Securities Owned			26,006.82
Gross Income			405,358.52
Income Deductions:			
Interest on Mortgage Debt		325,316.92	
Interest on Debt to Associated Companies		48,652.92	
Other Interest Charges		10.50	
Miscellaneous Income Deductions		1,583.10	
Total Income Deductions			375,563.44
Net Income			29,795.08
Miscellaneous Credits to Surplus		2,030.63	
Less: Miscellaneous Debits to Surplus		47,578.26	
Net Surplus Adjustment			45,547.63
Net Increase or (Decrease) in Surplus			15,752.55
Surplus at January 1, 1941			6,632,851.61
Surplus December 31, 1941			$6,648,604.16

[fol. 183]

STATEMENT OF PROFIT AND LOSS AND CHANGES IN SURPLUS

January 1, 1942, to December 31, 1942

Gas Operating Income:			
Operating Revenue			$973,668.70
Operating Revenue Deductions:			
Operating Expenses—			
Production Expenses	$203,126.72		
Transmission Expenses	23,163.69		
Distribution Expenses	1,434.72		
Customers' Accounting and Collecting Expenses	1,727.16		
Sales Promotion Expenses	4,890.28		
Administrative and General Expenses	89,022.47		
Total Operating Expenses		323,365.04	
Depreciation		181,445.82	
Amortization and Depletion of Producing Natural Gas Land and Land Rights		7,159.80	
Taxes		53,300.57	
Total Operating Deductions			565,271.23
Net Operating Revenue			408,397.47
Exploration and Development Costs:			
Delay Rentals		65,321.03	
Abandoned Leases		8,191.92	
Non-Productive Well Drilling		4,768.93	
Other Exploration Costs		151.50	
Total Exploration and Development			78,433.38
Net Utility Income			329,964.09
Other Income:			
Interest on Securities Owned			33,753.41
Gross Income			363,717.50
Income Deductions:			
Interest on Mortgage Debt		349,316.88	
Interest on Debt to Associated Companies		24,652.92	
Other Interest Charges		10.35	
Amortization Gas Plant Acquisition Adjustment		5,309.10	
Miscellaneous Income Deductions		993.00	
Total Income Deductions			380,282.25
Net Income			16,564.75
Miscellaneous Credits to Surplus		713.27	
Less: Miscellaneous Debits to Surplus		27,560.36	
Net Surplus Adjustment			26,847.09
Net Increase or (Decrease) in Surplus			43,411.84
Surplus (Deficit) at January 1, 1942			6,648,604.16
Surplus (Deficit) at December 31, 1942			$6,692,016.00

[fol. 184]

STATEMENT OF PROFIT AND LOSS AND CHANGES IN SURPLUS

January 1, 1943, to December 31, 1943

Gas Operating Income:			
Operating Revenue			$1,074,040.63
Operating revenue deductions—			
Operating expenses—			
Production expenses	$208,383.58		
Transmission expenses	19,248.02		
Distribution expenses	1,109.01		
Customers accounting and collecting expense	1,419.75		
Sales promotion expense	4,430.54		
Administrative and general expenses	88,549.68		
Total Operating Expense		323,140.58	
Depreciation		197,532.00	
Amortization, and depletion of producing natural gas land and land rights		7,764.94	
Taxes		52,034.83	
Total Operating Deductions			580,472.35
Net Operating Revenue			493,568.28
Exploration and Development Costs:			
Delay rentals on operated leases		61,253.55	
Abandoned leases		4,322.82	
Non-productive well drilling		28,834.43	
Other exploration costs		100.00	
Total Exploration and Development Costs			94,510.80
Net Utility Income			339,057.48
Other Income:			
Interest on securities owned			41,833.33
Gross Income			440,890.81
Income Deductions:			
Interest on First Mortgage bonds 6½%		207,416.64	
Interest on Ten Year Sinking Fund Debentures 7%		101,499.96	
Interest on Second Mortgage notes 6%		24,000.00	
Interest on debt to associated companies		24,652.92	
Other interest charges		16,409.88	
Amortization of gas plant acquisition adjustment		3,015.10	
Miscellaneous income deductions		1,380.52	
Total Income Deductions			378,375.02
Net Income			62,515.79
Miscellaneous Debits to Surplus			15,632.38
Net Decrease in Deficit			46,883.41
Surplus (Deficit) at January 1, 1943			6,692,016.00
Surplus (Deficit) at December 31, 1933			6,645,132.59

Note: Interest accruable on unpaid first mortgage bond coupons and on overdue installments of bond interest as provided by order of the United States District Court, Eastern District of Kentucky, dated May 13, 1944, and amounting to $212,592.43 for the year 1943 is not included in this Statement.

[fol. 185]

Original

3. "Comparative balance sheet of Inland Gas Corporation (combined accounts of corporation, receiver and trustee) for the years ending December 31st, 1927 through to December 31, 1943."

COMPARATIVE BALANCE SHEET
Inland Gas Corporation

(Combined Accounts of Corporation, Receiver & Trustee)
(1927–1929)

ASSETS AND OTHER DEBITS	December 31, 1927	December 31, 1928	December 31, 1929
Fixed Capital:			
Gas Plant	$1,242,241.79	$4,680,493.49	$4,863,955.82
Consfruction Work in Progress		3,632.68	22,229.80
	$1,242,241.79	4,684,126.17	4,892,185.62
Miscellaneous Intangible Capital	1,376,755.23	2,426,755.23	2,426,755.23
Total Fixed Capital	$2,618,997.02	7,110,881.40	7,318,940.85
Investment and Fund Accounts:			
Investments in Securities of Associated Companies			
Sinking Funds			
Total			
Current and Accrued Assets:			
Cash	$ 8,365.47	11,020.27	7,381.33
Interest Special Deposits		195,500.00	
Miscellaneous Special Deposits		5,000.00	
Working Funds	425.00	25.00	25.00
Temporary Cash Investments			
Accounts Receivable—Customers	44,497.55	114,526.47	97,683.47
Other Accounts Receivable	70.06	39,708.63	55,787.17
Receivables from Associated Companies		718,449.35	4,360.52
Materials and Supplies	56,451.99	125,718.44	99,573.87
Prepayments		1,958.05	1,595.09
Interest Receivable			
Total	$ 93,079.13	1,211,906.71	265,806.45
Deferred Debits:			
Unamortized Discount & Expense	$ 89,285.68	809,467.96	809,467.96
Other Deferred Debits		99,401.68	99,401.68
Total	$ 89,285.68	908,869.64	908,869.64
Total Assets and Other Debits	$2,801,361.83	9,231,657.75	8,493,616.94
LIABILITIES AND OTHER CREDITS			
Capital Stock:			
Common Capital Stock	$1,050,000.00	2,126,587.00	2,126,587.00
Preferred Capital Stock	200,000.00		
Total	$1,250,000.00	2,126,587.00	2,126,587.00
Funded Debt	1,000,000.00	5,900,000.00	5,856,000.00
Receiver's Certificates			
Total	$1,000,000.00	5,900,000.00	5,856,000.00

Original—Continued

3. "Comparative balance sheet of Inland Gas Corporation (combined accounts of corporation, receiver and trustee) for the years ending December 31st, 1927 through to December 31, 1943."

COMPARATIVE BALANCE SHEET
Inland Gas Corporation

(Combined Accounts of Corporation, Receiver & Trustee)
(1927–1929)

ASSETS AND OTHER DEBITS	December 31, 1927	December 31, 1928	December 31, 1929
Current & Accrued Liabilities:			
Notes Payable	$ 161,996.23	897,389.62	.....
Accounts Payable	30,771.46	71,476.37	38,615.86
Notes Receivable Discounted	.....	.....	.....
Payable to Associated Companies	.....	.....	466,458.03
Matured Interest	.....	.....	.....
Customers' Deposits	.....	.....	.....
Taxes Accrued	3,000.00	.....	.....
Interest Accrued	17,500.01	179,785.17	161,714.65
Other Current and Accrued Liabilities	1,467.00	.....	.....
Total	$ 214,734.70	1,148,651.16	666,788.54
Deferred Credits—Suspense Accounts	$	.....	.....
Reserves:			
Reserve for Depreciation, Depletion & Amortization	$ 76,874.68	280,171.20	490,802.06
Other Reserves	22,722.53	100,749.83	132,864.29
Total	$ 99,597.21	380,921.03	623,666.35
Capital Surplus	$ 348,739.30	278,806.68	258,834.30
Earned Surplus	111,709.38	603,308.12	1,038,259.25
	$ 237,029.92	324,501.44	779,424.95
Total Liabilities & Other Credits	$2,801,361.83	9,231,657.75	8,493,616.94

[fol. 186]

COMPARATIVE BALANCE SHEET

Inland Gas Corporation

(Combined Accounts of Corporation, Receiver & Trustee)
(1930—1932)

ASSETS AND OTHER DEBITS	December 31, 1930	December 31, 1931	December 31, 1932
Fixed Capital:			
Gas Plant	$5,089,145.45	$5,117,587.96	$5,086,507.19
Construction Work in Progress	11,462.85	5,094.34	17,620.33
	$5,100,608.30	5,122,682.30	5,104,127.52
Miscellaneous Intangible Capital	2,426,755.23	2,426,755.23	2,426,755.23
Total Fixed Capital	$7,527,363.53	7,549,437.53	7,530,882.75
Investment and Fund Accounts:			
Investments in Securities of Associated Companies	38,500.00	38,500.00	38,500.00
Sinking Funds	12,700.00	12,700.00	12,700.00
Total	$ 51,200.00	51,200.00	51,200.00
Current and Accrued Assets:			
Cash	$ 17,304.58	12,380.10	122,206.85
Interest Special Deposits			
Miscellaneous Special Deposits			
Working Funds	150.00	473.74	250.00
Temporary Cash Investments		177,734.38	177,734.38
Accounts Receivable—Customers	95,319.55	47,999.37	33,737.84
Other Accounts Receivable	25,911.59	25,529.12	12,561.82
Receivables from Associated Companies	60,943.38	29,623.01	36,473.06
Materials and Supplies	78,274.78	44,940.60	43,429.15
Prepayments	2,743.00	1,968.50	1,749.75
Interest Receivable			309.90
Total	$ 280,646.88	340,648.82	428,452.75
Deferred Debits:			
Unamortized Discount and Expense	$ 711,270.04	687,712.09	747,495.37
Other Deferred Debits	188,420.70	187,444.67	130,721.40
Total	899,690.74	875,156.76	878,216.77
Total Assets & Other Debits	$8,758,901.15	8,816,443.11	8,888,752.27
LIABILITIES AND OTHER CREDITS			
Capital Stock:			
Common Capital Stock	$2,126,587.00	2,126,587.00	2,126,587.00
Preferred Capital Stock			
Total	$2,126,587.00	2,126,587.00	2,126,587.00
Funded Debt	6,352,914.95	6,357,013.21	6,357,013.21
Receiver's Certificates			
Total	$6,352,914.95	6,357,013.21	6,357,013.21
Current & Accrued Liabilities:			
Notes Payable			
Accounts Payable	57,822.47	23,974.74	25,559.54
Notes Receivable Discounted			

COMPARATIVE BALANCE SHEET—CONTINUED

Inland Gas Corporation

(Combined Accounts of Corporation, Receiver & Trustee)
(1930—1932)

	December 31, 1930	December 31, 1931	December 31, 1932
Current & Accrued Liabilities:			
Payables to Associated Companies	460,004.04	497,228.30	446,134.77
Matured Interest		555,723.68	128,040.71
Customers' Deposits			50.00
Taxes Accrued	1,398.75	44,561.86	50,485.94
Interest Accrued	157,512.79		4,149.89
Other Current & Accrued Liabilities			3,593.53
Total	$ 676,739.05	1,121,488.58	658,014.38
Deferred Credits—Suspense Accounts	18,508.77	22,597.27	26,394.48
Reserves:			
Reserve for Depreciation, Depletion & Amortization	$ 699,571.26	837,964.47	1,104,956.15
Other Reserves	229,070.14	297,074.29	193,789.54
Total	$ 928,641.40	1,135,038.96	1,298,745.69
Capital Surplus	225,971.89	202,497.28	191,171.41
Earned Surplus	1,570,460.91	2,148,779.19	1,769,174.40
	$1,344,489.02	1,946,281.91	1,578,002.49
Total Liabilities & Other Credits	$8,758,901.15	8,816,443.11	8,888,752.27

[fol. 187]

COMPARATIVE BALANCE SHEET

Inland Gas Corporation

(Combined Accounts of Corporation, Receiver & Trustee)
(1933–1935)

ASSETS & OTHER DEBITS	December 31, 1933	December 31, 1934	December 31, 1935
Fixed Capital:			
Gas Plant	$5,186,483.83	$5,341,417.66	$5,455,611.60
Construction Work in Progress	26,945.06		
	$5,213,428.89	5,341,417.66	5,455,611.60
Miscellaneous Intangible Capital	2,426,755.23	2,426,755.23	2,426,755.23
Total Fixed Capital	$7,640,184.12	7,768,172.89	7,882,366.83
Investment & Fund Accounts:			
Investments in Securities of Associated Companies	38,500.00	38,500.00	38,500.00
Sinking Funds	$ 12,700.00	12,700.00	12,700.00
Total	$ 51,200.00	51,200.00	51,200.00
Current & Accrued Assets:			
Cash	81,615.13	83,187.54	161,813.57
Interest Special Deposits			
Miscellaneous Special Deposits			
Working Funds	250.00	250.00	250.00
Temporary Cash Investments	330,497.61	589,993.95	844,816.94
Accounts Receivable—Customers	40,665.39	56,380.42	97,339.21
Other Accounts Receivable	20,361.67	29,079.16	30,806.51
Receivables from Associated Companies	28,119.57	18,153.22	15,125.30
Materials and Supplies	73,872.63	61,924.33	56,145.58
Prepayments	897.72	2,271.63	1,107.32
Interest Receivable	531.25	973.95	6,708.31
Total	$ 576,810.97	842,213.60	1,214,112.74
Deferred Debits:			
Unamortized Discount and Expense	747,495.37	747,495.37	748,659.56
Other Deferred Debits	146,527.03	188,969.55	103,757.54
Total	$ 894,022.40	936,464.92	852,417.10
Total Assets & Other Debits	$9,162,217.49	9,598,051.41	10,000,096.67
LIABILITIES AND OTHER CREDITS			
Capital Stock:			
Common Capital Stock	$2,126,587.00	2,126,587.00	2,126,587.00
Preferred Capital Stock			
Total	$2,126,587.00	2,126,587.00	2,126,587.00
Funded Debt	6,357,013.21	6,357,013.21	6,357,013.21
Receiver's Certificates			
Total	$6,357,013.21	6,357,013.21	6,357,013.21
Current & Accrued Liabilities:			
Notes Payable			
Accounts Payable	21,515.30	28,933.05	33,836.23
Notes Receivable Discounted			
Payables to Associated Companies	443,417.36	434,364.33	684,113.39

COMPARATIVE BALANCE SHEET—Continued

Inland Gas Corporation

(Combined Accounts of Corporation, Receiver & Trustee)
(1933-1935)

ASSETS & OTHER DEBITS	December 31, 1932	December 31, 1934	December 31, 1935
Current & Accrued Liabilities:			
Matured Interest	128,049.71	128,040.71	2,133,568.58
Customers' Deposits	.....	45.00	45.00
Taxes Accrued	1,293.10	48,193.84	57,864.00
Interest Accrued	4,983.89	5,878.11	.....
Other Current & Accrued Liabilities	4,975.46	10,480.88	9,765.89
Total	$ 604,225.82	655,935.92	2,919,193.09
Deferred Credits—Suspense Accounts	30,364.16	32,902.22	33,180.01
Reserves:			
Reserve for Depreciation, Depletion & Amortization	$1,358,703.80	1,617,647.74	1,883,353.93
Other Reserves	220,016.54	240,611.06	272,104.10
Total	$1,578,720.34	1,858,258.80	2,155,458.03
Capital Surplus	158,563.82	133,705.76	100,015.14
Earned Surplus	1,693,256.86	1,566,351.50	3,691,349.81
	$1,534,693.04	1,432,645.74	3,591,334.67
Total Liabilities & Other Credits	$9,162,217.49	9,598,051.41	10,000,096.67

[fol. 188]

Inland Gas Corporation

(Combining Accounts of the Trustee & Corporation)

BALANCE SHEET—DECEMBER 31, 1936

ASSETS	December 31 1936
Fixed Capital:	
Property, Plant and Equipment	$5,574,836.17
Less: Accrued Depreciation, Depletion and Amortization	1,898,261.92
	3,676,574.25
Working Capital:	
Current Assets:	
Cash in Banks and on Hand	120,629.38
Cash—Time Deposits	26,759.14
Notes Receivable	1,000.00
United States Treasury 2⅞% Bonds 1955-60 (At Cost)	1,432,201.31
Accrued Interest United States Treasury Bonds	11,739.59
Accounts Receivable—Customers	98,628.99
Accounts Receivable—Affiliated Companies	30,778.62
Accounts Receivable—Other	13,046.17
Advances to and Amounts due from Officers and Employees	1,313.98
Prepaid Accounts	374.35
Supplies—General	68,010.45
	$1,804,481.98
Current Liabilities of Trustee:	
Accounts Payable	25,719.16
Accounts Payable—Affiliated Companies	2,014.63
Customers Service Deposits	45.00
Other Current Liabilities	2,143.77
Accrued Taxes (Estimated)	74,606.09
Other Accrued Lisabilities	7,040.79
	111,569.44
Net Working Capital	1,692,912.54
Total Fixed and Working Capital	5,369,486.79
Other Assets:	
Sinking Fund Deposits (Cash) First Mortgage 6½% Sinking Fund Gold Bonds, Series A, due February 1, 1938	10,700.00
Sinking Fund Deposits (Cash) 10 Year 7% Sinking Fund Debentures, due February 1st, 1938	2,000.00
Miscellaneous Intangible Capital:	
Contracts	1,050,000.00
Appreciation of Intangible Assets	1,376,755.23
	2,426,755.23
Less: Accrued Amortization	488,215.31
	1,938,539.92
5,500 Shares, No Par Common Stock of American Fuel & Power Co	38,500.00
Contingent Accounts Receivable	
Total Other Assets	1,989,739.92
Deferred Charges:	
Unamortized Debt Discount and Expenses	748,659.56
Other Deferred Charges and Suspense Accounts	1,384.19
Total Deferred Charges	750,043.75
Total Assets	$8,109,270.46

[fol. 189]

Inland Gas Corporation
(Combining Accounts of the Trustee & Corporation)
BALANCE SHEET—DECEMBER 31, 1936

LIABILITIES

	December 31 1936
First Mortgage Dated February 1, 1928, to Chatham Phenix National Bank and Trust Company (Succeeded by Manufacturers Trust Company) and James F. McNamara as Trustees:	
Advances under Section 16 of Article 5	
Accrued Interest	
First Mortgage 6½% Sinking Fund Gold Bonds, Series A, due Feb. 1, 1938	$4,254,700.00
Accrued Interest from August 1, 1930	1,774,564.45
	6,029,264.45
Total First Mortgage Debt and Accrued Interest	6,029,264.45
Second Mortgage Dated January 2, 1930, to Ashland National Bank as Trustee:	
10 Yr. 7% Sinking Fund Debentures, due Feb. 1, 1938, issued under Indenture of Trust dated February 1, 1928, to New York Trust Company, as Trustee	1,450,000.00
Accrued Interest from August 1, 1930	651,291.65
	2,101,291.65
6% Mortgage Notes, due February 1, 1938, issued under Indenture of Trust dated January 2, 1930, to Porter M. Gray, as Trustee	400,000.00
Accrued Interest from January 2, 1938	168,000.00
	568,000.00
Total Second Mortgage Debt and Accrued Interest	2,669,291.65
Total Mortgage Debt and Accrued Interest	8,698,556.10
Unsecured Creditors:	
Advances under Section 16 of Article 5 of First Mortgage dated Feb. 1, 1928	252,313.21
Accrued Interest	102,169.34
	354,482.55
General Creditors:	
Sundry Creditors	10,321.83
Affiliated Companies	383,776.23
Accrued Interest on Advances from Affiliated Companies	177,089.99
	571,188.05
Total Unsecured Creditors and Accrued Interest	925,670.60
Contingent Earnings Pending Rate Decision (Contra)	
Capital Stock:	
Common No Par 341,775 Shares	2,126,587.00
Surplus:	
Capital	82,809.52
*Earned	3,724,352.76
	$3,641,543.24
Total Liabilities	$8,109,270.46

* Includes no provision for Amortization of Debt Discount and Expense subsequent to December 2, 1930. Unadmitted Liabilities: Liabilities include no provision for claims under gas purchase contracts made by:

Hamilton Gas Company (Including Interest) as of Feb. 20, 1933	2,545,643.72
Piney Oil and Gas Company (No Interest Included) as of Mar. 23, 1934	1,465,593.20
	$4,011,236.92

[fol. 190]

Inland Gas Corporation

(Combining Accounts of the Corporation & Trustee)

COMPARATIVE BALANCE SHEET AS OF DECEMBER 31, 1937

ASSETS	At December 31, 1937
Fixed Capital:	
Property, Plant and Equipment	$5,820,386.02
Less: Accrued Depreciation, Depletion & Amortization	2,118,146.96
	$3,702,239.06
Working Capital:	
Current Assets:	
Cash in Banks and on Hand	$1,169,022.18
Cash—Time Deposit	52,291.92
Notes Receivable	1,000.00
United States Treasury 2⅞% Bonds, 1955–60 (At Cost)	509,004.26
United States Treasury 2½% Bonds, 1945 (At Cost)	140,000.00
Accrued Interest—United States Treasury Bonds	4,338.54
Accrued Interest—Other	15.00
Accounts Receivable—Customers	49,994.57
Accounts Receivable—Affiliated Companies	23,132.16
Accounts Receivable—Other	16,928.35
Advances to and Amounts due from Employees	389.87
Prepaid Accounts	3,108.53
Supplies—General	62,211.38
	$2,031,436.76
Current Liabilities of Trustee:	
Accounts Payable	$ 26,940.54
Accounts Payable—Affiliated Companies	10,622.25
Customers' Service Deposits	2,335.00
Other Current Liabilities	2,496.56
Accrued Taxes (Estimated)	64,927.54
Other Accrued Liabilities	5,279.06
	$ 112,600.95
Net Working Capital	$1,918,835.81
Total Fixed and Working Capital	$5,621,074.87
Other Assets:	
Sinking Fund Deposits (Cash) First Mortgage 6½% Sinking Fund Bonds Series A, due February 1, 1928	$ 10,282.60
Miscellaneous Intangible Capital:	
Contracts	$1,050,000.00
Appreciation of Intangible Assets	1,376,755.23
	$2,426,755.23
Less: Accrued Amortization	502,579.84
	1,924,175.39
5,500 Shares, No Par, Common Stock of American Fuel & Power Company	38,500.00
Total Other Assets	$1,972,957.99
Deferred Charges:	
Unamortized Debt Discount and Expense	$ 748,659.56
Other Deferred Charges and Suspense Accounts	4,028.46
Total Deferred Charges	$ 752,688.02
Total Assets	$8,346,720.88

[fol. 191]

Inland Gas Corporation

(Combining Accounts of the Corporation & Trustee)

COMPARATIVE BALANCE SHEET AS OF DECEMBER 31, 1937

LIABILITIES	At December 31, 1937
First Mortgage Dated February 1, 1928 to Chatham Phenix Bank and Trust Company (succeeded by Manufacturers Trust Company) and James F. McNamara, Trustees:	
First Mortgage 6½% Sinking Fund Gold Bonds, Series A, due Feb. 1, 1938	$4,254,700.00
Accrued Interest from August 1, 1930	2,051,119.95
Total First Mortgage Debt & Accrued Interest	$6,305,819.95
Second Mortgage dated January 2, 1930 to Ashland National Bank as Trustees:	
10-Year 7% Sinking Fund Debentures, due February 1, 1938, issued under Indenture of Trust dated February 1, 1928 to New York Trust Company, as Trustee	$1,450,000.00
Accrued Interest from August 1, 1930	752,791.65
	$2,202,791.65
6% Mortgage Notes due February 1, 1938, issued under Indenture of Trust dated January 2, 1930, to Porter M. Gray as Trustee	$ 400,000.00
Accrued Interest from January 2, 1930	192,000.00
	$ 592,000.00
Total Second Mortgage Debt and Accrued Interest	$2,794,791.65
Total Mortgage Debt and Accrued Interest	$9,100,611.60
Unsecured Creditors:	
Advances under Section 16 of Article 5 of First Mortgage dated February 1, 1928	$ 252,313.21
Accrued Interest	118,569.62
	$ 370,882.83
Sundry Creditors	$ 10,022.84
Affiliated Companies	383,776.23
Accrued Interest on Advances from Affiliated Companies	$ 201,742.91
	$ 595,541.98
Total Unsecured Creditors & Accrued Interest	$ 966,424.81
Capital Stock:	
Common, No. Par, 341,773 Shares	$2,126,587.00
Surplus:	
Capital	$ 68,444.99
*Earned	3,915,347.52
	$3,846,902.53
Total Liabilities	$8,346,720.88

* Includes no provision for Amortization of Debt Discount and Expense subsequent to December 2, 1930.

Unadmitted Liabilities: Liabilities include no provision for claim of Carbreath Gas Company, Hamilton Gas Company and Piney Oil and Gas Company in connection with gas purchase contracts.

[fol. 192]

COMPARATIVE BALANCE SHEET

Inland Gas Corporation

At December 31, 1938 and 1939

	December 31 1938	December 31 1939
ASSETS		
Property, Plant & Equipment	$8,081,327.40	$6,693,716.25
Investment in Affiliated Company (5500 Shares Common Stock—American Fuel & Power Co.)	38,500.00	38,500.00
Sinking Fund:		
First Mortgage Bond Sinking Fund	10,282.60	10,282.60
Current Assets:		
Cash—Second National Bank, Ashland, Ky.	163,815.46	177,820.22
Cash—Third National Bank, Ashland, Ky.	77,816.14	77,816.14
Cash—First National Bank, Louisville, Ky.	287.88	.....
Cash—First National Bank, Cincinnati, Ohio	356,609.52	.....
Petty Cash	300.00	300.00
United States Postal Savings Certificates	1,425,000.00	825,000.00
Accounts Receivable—Customers	60,106.45	82,340.50
Accounts Receivable—Allied Companies	33,085.94	53,725.72
Accounts Receivable—Other	13,177.92	11,226.74
Interest Accrued	9,500.00	22,000.00
Materials and Supplies	67,579.13	73,739.21
Total Current Assets	2,207,278.44	1,323,968.53
Deferred Charges:		
Prepaid Insurance	2,975.10	1,298.07
Prepaid Lease Rentals	2,837.11	1,724.74
Prepaid Gas Purchases	1,500.00	1,500.00
Suspense Accounts	5,366.68	8,445.16
Total Deferred Charges	12,678.89	12,967.97
Total Assets	$10,350,067.33	$8,079,435.35

[fol. 193]

COMPARATIVE BALANCE SHEET

Inland Gas Corporation

At December 31, 1938 and 1939

	December 31, 1938	December 31, 1939
LIABILITIES		
Capital Stock—Common	$2,126,587.00	$2,126,587.00
Funded Debt:		
First Mortgage 6½% Sinking Fund Gold Bonds (25% Retired 1939)	4,254,700.00	3,191,025.00
Ten Year 7% Sinking Fund Debentures	1,450,000.00	1,450,000.00
Second Mortgage 6% Notes	400,000.00	400,000.00
Total Funded Debt	6,104,700.00	5,041,025.00
Accrued Interest on Funded Debt:		
First Mortgage 6½% Sinking Fund Gold Bonds—Accrued Interest	2,327,675.45	2,596,548.83
Ten Year 7% Sinking Fund Debentures—Accrued Interest	854,291.65	955,791.65
Second Mortgage 6% Notes—Accrued Interest	216,000.00	240,000.00
Total Accrued Interest on Funded Debt	3,397,967.10	3,792,340.48
Current Liabilities:		
Accounts Payable	21,318.30	18,409.47
Account Payable—Allied Companies	2,337.12	8,125.99
Accrued Taxes	56,529.42	51,182.77
Accrued Insurance		140.25
Accrued Oil and Gas Royalties	5,338.89	10,535.76
Customers' Service Deposits	2,475.00	2,785.00
Other Current Liabilities	900.31	730.28
Total Current Liabilities	88,899.04	91,910.52
Reserves:		
Retirement & Depletion Reserve	2,365,758.98	2,473,554.14
Reserve for Depletion of Leasehold Appreciation	328,737.11	
Total Reserves	2,694,496.09	2,473,554.14
Deferred Liabilities—Claims of Unsecured Creditors Prior to Receivership:		
Note Payable—American Fuel & Power Co.	15,000.00	15,000.00
Loans Payable—American Fuel & Power Co.	368,631.62	368,631.62
Accrued Interest—American Fuel & Power Co.	226,395.84	251,048.76
Advances by Manufacturers Trust Co. & J. F. McNamara	252,313.21	252,313.21
Accured Interest—Manufacturers Tr. Co. & J. F. McNamara	134,969.90	151,370.19
Accounts Payable Prior to Receivership	10,022.84	10,022.84
Accounts Payable to Allied Co.'s Prior to Receivership	144.61	144.61
Total Deferred Liabilities	1,007,478.02	1,048,531.22
Surplus:		
Capital Surplus	63.00	
Surplus by Appreciation	42,724.72	
Earned Surplus (Deficit)	5,112,847.64	6,494,513.01
(Total Surplus)	5,070,059.92	6,494,513.01
Total Liabilities	$10,350,067.33	$13,079,435.35

[fol. 194]

COMPARATIVE BALANCE SHEET

Inland Gas Corporation

At December 31, 1940 and 1941

ASSETS	December 31, 1940	December 31, 1941
Plant:		
Gas Plant in Service	$5,587,885.50	$5,646,119.75
Gas Plant held for future use—Unoperated Leases	97,738.83	104,113.08
Construction Work in Progress	15,120.15	17,736.54
Gas Plant Acquisition Adjustments	161,711.94	139,298.33
Gas Plant Adjustments	850,437.00	850,437.00
Total Plant	$6,712,893.42	6,757,704.70
Investments and Funds:		
Investment in Associated Company (5,500 Shares Common Stock of American Fuel and Power Company)	38,500.00	38,500.00
Current and Accrued Assets:		
Cash—Second National Bank, Ashland, Ky.	247,378.41	190,014.50
Cash—Third National Bank, Ashland, Ky.	77,816.14	77,816.14
Working Fund—Petty Cash	300.00	300.00
Temporary Cash Investments	1,050,000.00	1,500,000.00
Accounts Receivable—Customers	80,383.42	87,228.23
Other Accounts Receivable	9,843.63	9,438.08
Accounts Receivable from Associated Companies	34,166.40	33,961.45
Materials and Supplies	76,865.84	116,105.44
Prepaid Insurance	5,631.29	3,493.29
Accrued Interest Receivable	40,750.01	66,750.00
Total Current and Accrued Assets	$1,623,135.14	$2,085,107.13
Deferred Debits:		
Suspense Accounts	6,881.04	1,243.33
Overpaid Lease Rentals	1,098.64	1,440.04
Accounts Receivable — Associated Companies in Bankruptcy	35,251.58	35,167.58
Total Deferred Debits	43,211.26	35,364.29
Total Assets	$8,417,739.82	$8,916,676.12

[fol. 195]

COMPARATIVE BALANCE SHEET
Inland Gas Corporation
At December 31, 1940 and 1941

LIABILITIES	December 31, 1940	December 31, 1941
Capital Stock—Common	$2,126,587.00	$2,126,587.00
Current and Accrued Liabilities:		
Accounts Payable	65,820.93	18,642.37
Accounts Payable to Associated Companies	457.48	10,764.92
Matured First Mortgage 6½% Bonds	3,191,025.00	3,191,025.00
Matured 7% Debentures	1,450,000.00	1,450,000.00
Matured Second Mortgage 6% Notes	400,000.00	400,000.00
Matured Interest on First Mortgage Bonds	2,803,965.47	3,011,382.11
Matured Interest on Debentures	1,057,291.65	1,158,791.65
Matured Interest on Second Mortgage Notes	264,000.00	288,000.00
Customers' Service Deposits	341.73	257.73
Taxes Accrued	3,560.44	4,332.45
Accrued Oil and Gas Royalties	8,597.84	10,329.57
Accrued Insurance	137.21	1,054.60
Other Current Liabilities	166.72	916.24
Total Current and Accrued Liabilities	$9,245,364.44	$9,545,496.64
Deferred Liabilities:		
Claims of Unsecured Creditors Prior to Receivership		
Notes Payable—American Fuel and Power Company	15,000.00	15,000.00
Loans Payable—American Fuel and Power Company	368,631.62	368,631.62
Accrued Interest—American Fuel and Power Company	275,701.68	300,354.60
Advances by Manufacturers Trust Company and J. F. McNamara	252,313.21	252,313.21
Accrued Interest—Manufacturers Trust Company and J. F. McNamara	167,770.46	184,170.74
Accounts Payable Prior to Receivership	10,022.84	10,022.84
Accounts Payable Associated Companies Prior to Receivership	144.61	144.61
Total Deferred Liabilities	$1,089,584.42	$1,130,637.62
Reserves:		
Reserve for Depreciation of Gas Plant	2,203,174.87	2,392,212.34
Reserve for Depletion of Producing Natural Gas Land Rights	247,060.91	235,763.32
Reserve for Abandoned Leases	71,066.29	68,929.49
Reserve for Amortization of Gas Plant Acquisition Adjustments	67,753.50	61,437.63
Total Reserves	2,589,055.57	2,758,342.78
Contributions in Aid of Construction		4,216.24
Surplus (Deficit)	6,632,851.61	6,648,604.16
Total Liabilities	$8,417,739.82	$8,916,676.12

[fol. 196]

COMPARATIVE BALANCE SHEET
Inland Gas Corporation

At December 31, 1942 and 1943

ASSETS	December 31, 1942	December 31, 1943
Plant:		
Gas plant in service	$5,718,757.04	$5,768,807.05
Gas Plant held for future use—Unoperated leases	100,907.10	48,682.74
Construction work in progress	10,710.47	33,633.35
Gas plant acquisition adjustments	139,298.33	128,187.54
Gas plant adjustments	850,437.00	850,437.00
[illegible]	6,820,109.94	6,829,747.68
[illegible] d company (5500 shares [illegible] American Fuel and Power [illegible]	38,500.00	38,500.00
Current and Accrued Assets:		
Cash—Second National Bank, Ashland, Ky.	117,567.20	244,891.54
Cash—Third National Bank, Ashland, Ky.	77,816.14	77,816.14
Working fund—Petty cash	300.00	375.00
Temporary cash investments	2,099,974.00	2,499,948.00
Accounts receivable—Customers	84,450.1	104,911.67
Other accounts receivable	9,530.2	10,312.36
Accounts receivable—Associated companies	24,131.83	20,187.44
Materials and supplies	94,469.45	97,054.39
Prepaid insurance	672.27	6,440.88
Accrued interest receivable	38,625.00	80,458.33
Total Current and Accrued Assets	2,547,536.55	3,142,395.75
Deferred Debits:		
Suspense accounts	(62.38)	1,473.00
Overpaid lease rentals	727.18	294.68
Accounts receivable—Associated companies in bankruptcy	35,167.58	35,167.58
Total Deferred Debits	35,831.38	36,935.26
Total Assets	$9,441,977.87	$10,047,578.69

[fol. 197–210]

COMPARATIVE BALANCE SHEET
Inland Gas Corporation
At December 31, 1942 and 1943

	December 31, 1942	December 31, 1943
LIABILITIES		
Capital Stock—Common	$2,126,587.00	$2,126,587.00
Current & Accrued Liabilities:		
Accounts payable	22,713.68	32,686.81
Accounts payable—Associated companies	15,751.25	2,221.98
Matured First Mortgage 6½% bonds	*3,191,025.00*	*3,191,025.00*
Matured 7% debentures	1,450,000.00	1,450,000.00
Matured Second Mortgage 6% notes	400,000.00	400,000.00
Accrued interest on First Mortgage bonds	3,218,798.75	3,426,215.39
Accrued interest on debentures	1,260,291.61	1,361,791.57
Accrued interest on Second Mortgage notes	312,000.00	336,000.00
Customers' Service deposits	242.73	242.73
Accrued taxes	3,554.38	50,318.79
Accrued oil and gas royalties	5,704.79	6,938.31
Accrued insurance	691.10	1,420.38
Other current liabilities	433.94	601.70
Total Current and Accrued Liabilities	9,881,177.93	10,259,462.66
Deferred Liabilities:		
Claims of unsecured creditors prior to receivership		
Notes payable—American Fuel & Power Co.	15,000.00	15,000.00
Loans payable—American Fuel and Power Co.	368,631.62	368,631.62
Accrued interest—American Fuel and Power Co.	325,007.52	349,660.44
Advanced by Manufacturers' Trust Company and J. F. McNamara	252,313.21	252,313.21
Accrued Interest—Manufacturers Tr. Co. & J. F. McNamara	200,571.02	216,971.30
Accounts payable prior to receivership	10,022.84	10,022.84
Accounts payable associated company prior to receivership	144.61	144.61
Total Deferred Liabilities	1,171,690.82	1,212,744.02
Reserves:		
Reserve for depreciation of gas plant	2,560,973.23	2,735,262.09
Reserve for depletion of producing natural gas land rights	249,090.92	254,138.26
Reserve for abandoned leases	67,212.47	24,926.08
Reserve for amortization of gas plant acquisition adjustments	80,045.91	75,375.02
Total Reserves	$2,950,322.58	$3,089,701.36
Contributions in Aid of Constructions	4,216.24	4,216.24
Surplus (Deficit)	6,692,016.00	6,645,132.59
Total Liabilities	$9,441,977.87	$10,047,578.69

Note: Interest accruable on unpaid first mortgage bond coupons and on overdue installments of bond interest as provided by order of the United States District Court, Eastern District of Kentucky, dated May 13, 1944, and amounting to $1,524,359.09 at December 31, 1943 is not included in this Balance Sheet.

[fol. 211] DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF KENTUCKY

No. 1341

J. T. WILLIAMS and MILES GIBSON, Partners Doing Business under the Firm, Name and Style of Williams & Gibson, Plaintiffs,

v.

INLAND GAS CORPORATION, Defendant

BILL OF COMPLAINT—Filed December 1, 1930

To the Honorable the Judge of the District Court of the United States for the Eastern District of Kentucky:

The plaintiffs, J. T. Williams and Miles Gibson, partners doing business under the firm name and style of Williams & Gibson, both citizens of the State of Kentucky and residents respectively, of Floyd and Knott Counties in said state, bring this their bill of complaint, on their own behalf and on behalf of all other creditors of the defendant, Inland Gas Corporation, who may join in the [fol. 212] prosecution of this suit against Inland Gas Corporation, a corporation organized and existing under the laws of the State of Delaware, and a citizen and resident of said state, and thereupon complain and allege as follows:

I. This is a suit of a civil nature wherein there is involved a controversy wholly between citizens of different states, and wherein the matter and amount in controversy, exclusive of interest and costs, exceeds the sum or value of three thousand dollars ($3,000).

II. The plaintiffs are citizens of the State of Kentucky and residents, respectively, of the Counties of Floyd and Knott in said State.

III. The defendant was at all the times hereinafter mentioned and now is a corporation organized and existing under the laws of the State of Delaware, and is a citizen and resident of said State, with its principal office in Wilmington, Delaware.

IV. The defendant is indebted to the plaintiff in the sum of $5,286.00 for services rendered to the defendant

at the defendant's request. The payment of said sum has been duly demanded by the plaintiffs of the defendant and payment has been refused and the same is now due and unpaid and the plaintiffs have no security for said indebtedness.

V. On information and belief, the defendant was organized in the year 1927 for the purpose of carrying on the business of an oil and gas company; to produce, drill for, discover, mine, reduce to possession, purchase or otherwise obtain, to store, take, accumulate or otherwise hold, to market, handle, sell, deal in or otherwise dispose of, to manufacture, distill, refine, compress, convert, manipulate or otherwise prepare for market, and to transport, carry or otherwise distribute natural gas, rock or carbon oils, petroleum, and other mineral substances and any by-product thereof, to lease, contract for, purchase or otherwise acquire, to take, hold, and own, and to sell, assign, transfer, mortgage, lease or otherwise dispose of, natural gas, rock or carbon-oil, petroleum and other mineral lands, and leaseholds, or other interests therein; to purchase, contract for, lease, contract or otherwise obtain, to take, hold or other- [fol. 213] wise own, to sell, lease, mortgage, or otherwise dispose of, to manage, use, maintain, develop, improve or otherwise operate, drills, tools, rigs, tanks, containers for storage, pipe-lines, compressors, pumping stations, booster plants, tank cars, watercraft, distilleries, refineries, and all other plants, works, machinery, appliances, facilities and other properties or appurtenances, for the production, storage, marketing, manufacturing and transportation of natural gas rock or carbon oil, petroleum and other minerals, and any by-products thereof. On information and belief the defendant has been and is engaged in such business in this district. On information and belief, the defendant owns, among other properties, numerous parcels of valuable gas and oil producing real estate, oil and gas rights under leases, pipe lines, franchises, rights of way and easements for use in such business in this district.

VI. Upon information and belief the defendant has outstanding 341,775 shares of no par value common stock, all but a very small number of which are owned by American Fuel and Power Company, a Delaware Corporation; it has outstanding obligations of approximately four million two

hundred sixty seven thousand dollars ($4,267,000.) principal amount of First Mortgage 6½% Sinking Fund Gold Bonds, Series A, due February, 1938, issued under a mortgage or deed of trust dated as of February 1, 1928, of the defendant to Chatham Phenix National Bank and Trust Company and James F. McNamara, Trustee, and of approximately one million four hundred fifty six thousand five hundred dollars ($1,456,500.) principal amount of 10 year 7% Sinking Fund Debentures issued under an indenture of trust dated as of February 1, 1928, of the defendant to The New York Trust Company of the City of New York, Trustee, which debentures by the terms thereof will mature and become payable on or about February 1, 1938; and of approximately $400,000 principal amount of 6% Gold Notes issued under an agreement dated as of January 2, 1930, of the defendant to Porter N. Gray, as Trustee, which notes by the terms thereof will mature and become payable on or about February 1, 1938, both the said Debentures and Notes being further secured by a mortgage or deed of trust [fol. 214] dated as of January 2, 1930, of the defendant to Ashland National Bank, as Trustee.

The defendant's current liabilities, as shown on its balance sheet as of October 31, 1930, including notes payable, accounts payable, current expenses, accrued interest and various reserves amounted in the aggregate to approximately $1,443,212.79, some of which obligations are now due and payable, most of which obligations are unsecured.

The assets of defendant as shown on said balance sheet consist of cash $11,630.87, inventories $85,596.64, notes and accounts receivable $125,479.96, as of September 30, 1930, and in addition amounts due from and investments in affiliated companies, deferred charges and fixed assets, consisting of real estate, leaseholds, wells, pipe lines, drilling equipment, tools, furniture and fixtures of the value of $8,550,293.37.

As shown by said balance sheet the defendant is solvent and its assets are of a value in excess of its liabilities.

Upon information and belief the defendant has not on hand and will be unable to procure sufficient moneys to meet its interest charges on its said Bonds or Debentures which will mature on January 1, 1931; and although the defendant has made repeated and diligent efforts to procure funds necessary to meet its matured and presently

maturing obligations, it has been unable to do so, or to obtain sufficient moneys to carry on its business.

VII. On information and belief, certain of the creditors of the defendant are pressing their claims for payment and the plaintiffs apprehend that they will forthwith bring suit thereon and attach the property of the defendant, enter thereon and place a sheriff, marshal or other officer in possession thereof and in divers other manners enforce their respective claims. Such action on the part of such creditors will, as the plaintiffs believe, result in judgments, executions and seizures by sheriffs, marshals and other like officers and in forced sales of the property of the defendant, with the necessary consequence that the defendant will be compelled to cease the conduct of its business. Any such action on the part of such creditors will interfere with and obstruct the business of the defendant, will cause the sus- [fol. 215] pension of such business and will cause great and irreparable injury and loss to the defendant and to its creditors, including the plaintiffs.

VIII. On information and belief, the defendant has contracts for the sale at profitable prices of large quantities of its natural gas to industrial consumers and has valuable gas rights under leases which will not be performed or realized upon if the business of the defendant is not conducted in its entirety and as a going concern, and unless the defendant shall be permitted to produce and exploit the natural gas in its gas wells and to maintain its properties in good order and perform such contracts, such gas producing property and its leases will greatly depreciate in value and such contracts will be cancelled or otherwise abrogated; and the defendant and its creditors, including the plaintiff, will suffer heavy losses as a result thereof. Should any of the creditors of the defendant succeed in enforcing their claims and thereby compel the defendant to suspend its business and become inactive, irreparable injury, damage and loss will be sustained by the plaintiffs and by the other creditors of the defendant.

IX. On information and belief, a large part, in fact the most valuable part of the property of the defendant consists of gas leases granted to the defendant or their assignors by sundry land owners, by the terms of which leases or grants, certain periodical payments of royalties and

rentals are required to be made; that said leases provide for the forfeiture thereof in case of default in the payment of said periodical royalties and rentals; that said leases are of gas rights in property located in the State of Kentucky and were executed and are to be performed in said State; that under Section 3766-B-1 of the Kentucky Statutes of 1922, said leases would be forfeited and forever extinguished upon the non-payment of the royalties and rentals, when and as the same are due, as in said leases provided; that defendant has not, and will be unable to procure, sufficient funds to pay such royalty and rental payments and unless the defendant can procure funds to defer and pay such royalties and rentals when and as the same fall due as provided in said leases the leases will for- [fol. 216] ever be forfeited and extinguished and the use and enjoyment of the wells, and the pipe lines situated on the leased property which have been developed and built by and at the expense of the defendant, will forever be lost to the defendant, all to the great loss and irreparable injury of the defendant and of its creditors including the plaintiffs.

Upon information and belief, the properties owned and/or leased by the defendant are situated in approximately —— counties in the State of Kentucky; that the defendant is subject to pay a tax to each of said —— counties on such of its property located in each of said counties and is subject to pay a tax to the State of Kentucky on all of its property owned and/or leased in said State; that Section 4091 of the Kentucky Statutes of 1922 declares that all state and county taxes shall be due and payable 30 days after notice of the same has been given a corporation and upon the failure to pay said taxes when due a penalty equal to 10% of the amount of the tax is assessed against such corporation and the taxes in arrears bear interest at the rate of ten per centum per annum; that the corporation is guilty of a misdemeanor and is subject to a fine of $50 for each day a tax remains unpaid; that it has not, and will be unable to procure, sufficient funds to pay such taxes which will be assessed by the state of Kentucky and said —— counties when and as the same are due and payable and unless the defendant can procure funds to pay such taxes when and — the same are due and payable the defendant will be subjected to said penalties and to a fine by said state and each of said —— counties of $50 for each and every day that such taxes are not paid.

On information and belief, the defendant, in the conduct of its business as aforesaid, is also required to employ manager and general employees and to pay for their services and to make other necessary operating expenditures and unless the defendant can procure funds to defray and pay such wages and necessary operating expenses, the defendant will be unable to continue to conduct its business and to perform its contracts, and its gas wells, pipe lines, franchises, contracts and other properties will greatly de-
[fol. 217] preciate in value and must necessarily be sold at much less than the actual value thereof, and the defendant and its creditors, including the plaintiffs, will suffer heavy losses as a result thereof.

X. On information and belief, while the property and assets of the defendant are of great value as an entirety and as a going concern, and at a fair valuation exceed the amount of the defendant's indebtedness as aforesaid, if said property and assets should be sold or disposed of at forced sale separately and not as an entirety, they would not bring their true value and would in all probability prove to be insufficient to provide in full for the payment of the indebtedness of the defendant. It is essential for the protection of the rights and equities of the creditors and stockholders of the defendant that its properties and assets including said leases, pipe-lines, purchases and sales contracts be preserved and protected and that they be held together, operated and ultimately sold or otherwise disposed of as an active and going entirety. If said properties and assets be dismembered by separate sales under execution or if they cease to be operated or fall into disuse, or disrepair, or rentals be not paid on said leases or if said property and assets be sold or disposed of other than as an active and going entirety, the creditors of the defendant, including the plaintiffs, and the defendant and its stockholders, will thereby suffer irreparable injury, damage and loss.

XI. Any attempt by the plaintiff to enforce at law its claims as a general creditor of the defendant will precipitate similar action on the part of other creditors of the defendant which in turn will lead to wasteful strife and controversy. The plaintiffs believe that such strife and controversy can be avoided and the property of the defendant preserved for equitable distribution among those

entitled thereto, and that such property can be disposed of advantageously and the valuable leases and contracts of the defendant be performed and realized upon only through the intervention of this Honorable Court and the granting of equitable relief, including the appointing of a Receiver. The continuance of the business of the defendant as a [fol. 218] whole under the direction of this Honorable Court is essential in order that hereafter the assets of the defendant may, if possible, be sold as an entirety and as a going concern and said leases preserved and contracts performed and realized upon. On information and belief, the defendant has not and will be unable to procure sufficient funds to enable its business to be conducted unless a Receiver be appointed, who can borrow the necessary funds subject to the approval of this Honorable Court. Such action is especially necessary in view of the fact that the leases and contracts which the defendant has entered into can be preserved and realized upon, without loss but at a profit, only if its business as a whole can be carried on without interruption. Unless this Honorable Court, in view of the present inability of the defendant to meet its due and maturing obligations, will deal with the properties of the defendant as a whole as a trust fund for the payment of its creditors as their several interests therein shall appear, such properties will be dissipated, wasted and sacrificed and interminable litigation will ensue to the great and irreparable damage and injury of the plaintiff and the other creditors of the defendant and of the defendant itself, and by reason of the resultant breach of said contracts, numerous claims for damages will arise which would be obviated by the performance of said contracts on behalf of the defendant.

XII. Inasmuch as the plaintiffs have no adequate remedy at law, but can have relief only in equity, the plaintiffs file this Bill of Complaint on behalf of themselves and all other creditors of the defendant who shall come in and contribute to the expenses of this suit, and the plaintiffs pray for equitable relief as follows:

(1) That this Honorable Court administer all and singular the property, rights and assets of the defendant, and adjudicate, enforce and adjust the rights, liens, equities and claims of all the creditors of the

defendant therein, including the claim of the plaintiffs, as the same may be determined.

[fol. 219] (2) That in order to preserve and protect the properties and assets of the defendant and in order that they may be held together, operated and ultimately sold or otherwise disposed of as a going entirety, this Honorable Court forthwith appoint a Receiver of all and singular the property and assets of every nature, wheresoever situate, held, owned or controlled by the defendant, with full power and authority to take into his possession and to hold such property and assets and to continue, manage and operate as a whole the business now being conducted by the defendant, with such powers as this Honorable Court may from time to time grant.

(3) That said Receiver be authorized and empowered to bring suit for, collect, receive and take into his possession all the property and assets real, personal or mixed, goods, chattels, credits, rights, claims and equities, books, papers, securities, cash and other property whatsoever and wheresoever situate, of the defendant; to institute, prosecute, become party to, intervene in, compromise or defend suit and actions at law or in equity or otherwise, either for the recovery or protection or maintenance of any of the property and assets of the defendant, as he may deem necessary or proper, including the institution and prosecution of such proceedings in any court or courts of the United States or of any state or of any foreign nation as he may deem advisable, and including also any other suits, actions or proceedings at law or in equity or otherwise in which the defendant may have any interest as plaintiff, defendant or otherwise, and including the power to continue any such pending suits and to defend or otherwise dispose of any such proceedings, suits or actions; to settle or compound or make allowances on any or all debts now due and owing, or which may hereafter be due or owing, to the defendant, as he may deem advisable or proper.

(4) That said Receiver be authorized and empowered to continue the operation of the busines of the defendant as an entirety, and to that end, to employ

[fol. 220] and discharge and pay the compensation, the salaries and wages of such attorneys, counsel, managers, superintendents, foremen, accountants, bookkeepers, agents, employes, laborers, mechanics and workmen, as he may deem necessary or advisable in connection with the custody, control, preservation and management of the properties and business of the defendant, and to borrow money from time to time on receiver's certificates or otherwise for the purpose of paying the compensation, salaries and wages of such attorneys, counsel, managers, superintendents, foremen, accountants, bookkeepers, agents, employes, laborers, mechanics and workmen; to continue the existing purchasing, producing, selling, business and financial agreements, arrangements and relations of the defendant with other corporations, firm- and individuals, to the extent he may deem advisable, until the further order of this Court; to perform the existing contracts and leases of the defendant to the extent that performance thereof may seem to him desirable or profitable; to enter into and perform other contracts in the regular course of conduct of the business of the defendant or otherwise; to purchase such merchandise, supplies, equipment, materials or other property as may be necessary or advisable in connection with the administration of the assets of the defendant and the continuation of its business as an entirety and particularly to maintain the customary arrangements of the defendant for the purchase and sale of natural gas so far as may be deemed necessary or advisable by said Receiver; to sell for cash or on credit all or any part of the assets of the defendant; to pay any and all claims for services, wages, labor, gas, supplies, materials, equipment or otherwise that may be entitled to priority, or which might constitute a lien upon any of the property of the defendant; to pay the salaries and wages of agents, employes, laborers and servants of the defendant, accrued or to accrue, so far as said Receiver may deem necessary or expedient to secure the continuation of the services of such agents, employes, laborers and workmen or to avoid detriment to the working organi-
[fol. 221] zation of the business, to advance moneys of the defendant from time to time to any or all corporations owned or controlled by the defendant or in which

the defendant may have an interest or which may be indebted to the defendant, so far as may be deemed necessary or advisable by such Receiver in order to protect or preserve the value of the investment of the defendant in such corporations or the value of the indebtedness of such corporations to the defendant; to incur and discharge any and all expenses which he may deem necessary or advisable in connection therewith; to pledge or otherwise hypothecate as security therefor any and all assets of the defendant; and to have the usual powers of Receivers in such cases; all to the end that the business of the defendant may be continued, operated and manages as an entirety according to the customary and usual manner of conducting similar businesses until the further order of this court in the premises.

(5) That in continuing, managing and operating the business of the defendant said Receiver be authorized to act in association with any receiver who may be appointed by any other court to take possession of and operate any property or assets of the defendant situated outside the territorial jurisdiction of this Court, and to that end to transfer and consent to the transfer from time to time of any and all assets of the defendant to or from the territorial jurisdiction of this court and such other jurisdictibn or jurisdictions for the purposes of said business to the extent that the conduct thereof may from time to time reasonably require, and to cooperate to the fullest extent with any such receiver in continuing, managing and operating said business as a whole, and in arranging for and making any and all such transfers.

(6) That all creditors and stockholders of the defendant and all other persons, firm- and corporations be enjoined from instituting or prosecuting or continuing the prosecution of any actions, suits or other proceedings at law or in equity or admiralty or under any statute against the defendants, and from libeling, levy- [fol. 222] ing any attachments, executions or other processes upon or against any of the properties of the defendant, or from taking or attempting to take into their possession any part of the property of the defendant and from doing any act whatsoever to interfere

with the possession and management by said Receiver of the properties and business of the defendant or in any way to interfere with said Receiver in the discharge of his duties or to interfere in any way with the administration and disposition in this suit of the affairs and properties of the defendant.

(7) That all creditors of the defendant and all persons interested in the defendant be permitted to intervene in and become parties to this suit, if and as permitted and authorized so to do by this Honorable Court.

(8) That a writ or writs of injunction issue out of and under the seal of this Honorable Court, directing, enjoining and restraining the defendant and the officers, superintendents, managers, attorneys, agents and employes of the defendant, and all other persons, firms and corporations, from interfering with, transferring, selling or disposing of any of the property or income of the defendant or from taking possession or of attaching or levying upon, or attempting to sell or dispose of in any manner, any part of the property of the defendant.

(9) That this Honorable Court will grant unto the plaintiffs not only a writ of injunction, but also a writ of subpoena of the United States of America, issued out of and under the seal of this Honorable Court, and directed to the defendant, therein and thereby commanding it on a certain date therein named, under a certain penalty, to appear before this Honorable Court to answer (but not under oath, an answer under oath being hereby expressly waived), this Bill of Complaint and each and every statement and allegation herein made, and to stand by, perform and abide by such orders, directions and decrees as may be made against it in the premises and as shall seem proper and right in equity and in good conscience.

[fol. 223] (10) That at such time or times as may be found just and proper the properties of the defendant may be ordered to be sold in such manner and upon such terms and conditions as this Honorable Court shall deem just and equitable, and that any such order of sale shall make proper and suitable provision for the

preservation of all equities, rights, priorities, claims and liens of the creditors of the defendant, and shall provide for the sale of the property of the defendant subject to or free and clear from any and all liens and encumbrances, in whole or in part, in such manner and upon such terms as this Honorable Court may direct, and that the proceeds of any such sale be distributed among those entitled thereto, as this Honorable Court shall adjudicate, and that in case of any sale herein of the property of the defendant, it may be directed to make, execute and deliver to the accepted purchaser or purchasers upon any such sale such releases, bills of sale and conveyances as may be necessary or proper to vest in such purchaser or purchasers the title to all such several properties; or that the properties of the defendant may be returned to the defendant, if and to the extent that proper provision shall be made for the claims of the plaintiffs and other creditors of the defendant, and that the plaintiffs may have such other and further and different relief in the premises as to this Honorable Court may seem proper, and as may be necessary fully to protect and enforce the rights and equities of the plaintiff and of all the other creditors of the defendant.

(11) That such order shall be made by this Honorable Court as to the service of this Bill of Complaint and of any order or decree that may be made in this suit, as may be deemed sufficient and proper by this Honorable Court, and that the plaintiff may have such other and further relief in the premises as the nature and circumstances of the case may require and as to this Honorable Court may seem just and proper.

And the plaintiffs will ever pray, etc.

LeWright Browning, Solicitor for Plaintiffs.

[fol. 224] IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

In Equity. No. 1341

J. T. WILLIAMS AND MILES GIBSON, Partners doing business under the firm name and style of Williams & Gibson, Plaintiff,

against

INLAND GAS CORPORATION, Defendant

ORDER APPOINTING RECEIVER—Filed December 2, 1930

Now on this 2nd day of December, 1930, this cause came on to be heard upon the Bill of Complaint duly filed herein and the answer of the defendant above named admitting each and every allegation of said Bill of Complaint, which answer was duly filed, and after due deliberation, on motion of the solicitor for the plaintiff, the defendant appearing and consenting thereto, it is

Ordered, Adjudged And Decreed As Follows:

First: That the defendant, though appearing to have property and assets which exceed its liabilities, is now unable to meet its matured and immediately maturing obligations, and will continue for a considerable period of time to be unable to meet such matured and maturing obligations, or any substantial portion thereof.

Second: That the plaintiff is entitled to the relief herein granted, and that the plaintiff has no adequate remedy save through the granting of this decree, and that it is necessary for the protection and preservation of the respective rights and equities of the plaintiff and of all other creditors of the defendant and of its stockholders, that the properties and business of the defendant be preserved and administered as an entirety in this suit through a Receiver [fol. 225] to be appointed by this Court, and that it is necessary that a Receiver of the defendant and of its property be appointed forthwith with the powers herein granted.

Third: That W. E. Lockhart, of Ashland, Ky., be and hereby is appointed Receiver of the above named defendant, and of all of the property and assets of the defendant,

real, personal and mixed, and of whatsoever kind and description, including all lands, buildings, gas wells, pipe lines and appurtenances owned, controlled, leased or operated by said defendant and all other stock and equipment, tools, machinery, furniture, materials, supplies, merchandise, books of account, records and other books, papers and accounts, cash on hand, in bank or on deposit, things in action, credits, stocks, bonds, securities, deeds, leases, contracts, muniments of title, bills and accounts receivable, rents, issues, profits, tools and income accruing and to accrue, as well as all interests, easements, privileges, franchises, concessions and appurtenances, and all assets and property of all and every kind, character and description whatsoever of said defendant wheresoever situate.

Fourth: That said defendant and all persons acting under its direction shall deliver to said Receiver any and all properties of said defendant, real, personal or mixed, in their possession or under their control.

Fifth: That the defendant, its stockholders, directors, officers, agents, servants and employes, and all other persons, firms and corporations, including sheriffs and marshals, and their officers, agents, attorneys, proctors, representatives, servants and employes, whether creditors or claiming to be creditors or having or claiming to have any right, title or interest of, in or to any property or properties of the defendant, be and hereby are enjoined and restrained from instituting or prosecuting or continuing the prosecution of any action at law or action or proceeding in equity or admiralty against the defendant in any court of law or equity or admiralty or before any association, organization or arbitration board or arbitration committee, referee, umpire or other court or tribunal of any association or organization, or otherwise, or from executing or issuing or causing the execution or issuance out of any court [fol. 226] of any writ, process, summons, attachment, subpoena, replevin or any other proceeding for the purpose of impounding or taking possession of or interfering with any property owned by or in the possession of the defendant or of said Receiver or owned by the defendant and in the possession of any officers, agents, servants, attorneys or representatives of the defendant, or of any other person, party, firm or corporation, and all persons, parties, firms and corporations, including the defendant, and their rep-

resentatives, agents, attorneys and servants, and all sheriffs, marshals and other officers and their deputies, representatives and servants, are hereby enjoined and restrained from selling, removing, transferring, disposing of or attempting in any way to sell, remove, transfer or dispose of or in any way to interfere with any property, assets or effects in the possession of the defendant or of said Receiver or owned by said defendant and in the possession of any officers, agents, attorneys or representatives of said defendant, or of any other person, party, firm or corporation and from doing any act whatsoever to interfere with the possession and management by said Receiver of the properties of said defendant, or in any way to interfere with said Receiver in the discharge of his duties or to interfere in any way with the administration and disposition in this suit of the affairs and properties of the defendant.

Sixth: That until the further order of this Court said Receiver be and hereby is authorized and directed forthwith to take and have complete and exclusive control, possession and custody of all of the assets and properties of the defendant of every name, nature and description, wherever situate or found, and all persons, firms and corporations, including the defendant, their officers, agents and servants, shall forthwith deliver to said Receiver all properties of every name, nature and description and wheresoever located, of said defendant; and that said defendant, its officers, directors, agents, attorneys and employes, be and hereby are directed upon the request of said Receiver, to endorse, transfer, set over and deliver to said Receiver all shares or certificates of stock, notes, bonds, [fol. 227] bills of exchange and other documents and muniments of title standing in the name of or in the possession or control of said defendant or as to which said defendant has any interest, and to execute and deliver powers of attorney or proxies authorizing said Receiver to exercise any and all voting rights and rights of conversion, redemption and other rights, powers and privileges pertaining thereto; and that said Receiver be and hereby is authorized to exercise any and all such rights, as he may deem necessary or advisable.

Seventh: That said Receiver be and hereby is authorized and directed to continue, conduct, manage and operate

said properties and business of the defendant until the further order of this Court in such manner as will best preserve such business as a whole and the value thereof as an entirety, and to that end said Receiver is hereby authorized to make and perform contracts for the production and/or purchase and sale of natural gas and any other of the products customarily produced, purchased or sold by the defendant in its business, and to carry out and perform such contracts as the defendant may have for the production or sale of its natural gas products remaining in whole or in part unperformed, and to purchase natural gas and such other merchandise, materials, supplies and equipment, as said Receiver may deem necessary or advisable to enable him to carry out such contracts and leases, and to continue to conduct the business of the defendant as an entirety and particularly to maintain the customary arrangements of the defendant for the purchase and sale of natural gas so far as may be deemed necessary or advisable by said Receiver in order to preserve the leases and contracts of the defendant; to continue, modify or abrogate, as he may deem advisable, any and all existing selling, purchasing, financial and business contracts, agreements, arrangements and relations between the defendant and other corporations, firms or individuals; to advance moneys of the defendant from time to time to any or all corporations owned or controlled by the defendant or in which the defendant may have an interest or which may be indebted to the defendant, so far as may be deemed neces-
[fol. 228] sary or advisable by said Receiver in order to protect or preserve the value of the investment of the defendant in such corporations or the value of the indebtedness of such corporations to the defendant; to carry out and perform, as he may deem advisable, any and all obligations, conditions incumbent upon the defendant under its leases, contracts, concessions and franchises and to protect, preserve and continue such leases, contracts, concessions and franchises, as he may deem advisable, for the benefit of the defendant and its creditors and stockholders; and to preserve the property of every kind and description of the defendant of which he is hereby made Receiver in proper condition and repair so that it may be safely and advantageously used, and, by insurance or otherwise, to fully protect the same; and that in continuing, managing and operating said business said Receiver be and hereby is

authorized to act in association with any receiver who may be appointed by any other Court to take possession of and operate any property or assets of the defendant situated outside the territorial jurisdiction of this Court, and to that end to transfer and consent to the transfer from time to time of any and all such raw materials, materials in process, finished products, moneys and credits to or from the territorial jurisdiction of this Court and any such jurisdiction or jurisdictions for the purposes of said business to the extent that the conduct thereof may from time to time reasonably require, and to cooperate to the fullest extent with any such receiver in continuing, managing and operating said business as an entirety, and in arranging for and making any and all such transfers.

Eighth: That said Receiver be and hereby is authorized in his discretion to employ and discharge such officers, managers, agents, employes, servants, accountants, attorneys and counsel as may in his judgment be advisable or necessary in the management, conduct, control or custody of the properties and business of the defendant and that said Receiver be and hereby is authorized to make such payments and disbursements as may be needful or proper for the purposes aforesaid or for the preservation and operation of the properties and business of the defendant, in-
[fol. 229] cluding authority to make payment of debts entitled to priority and of the wages and salaries of agents, employes, laborers and servants of the defendant, accrued or to accrue, which may be entitled to priority by statute or which said Receiver may deem necessary or expedient to pay in order to secure the continuation of the services of such agents, employes, laborers or servants or to avoid detriment to the working organization of the business.

Ninth: That said Receiver be and hereby is fully authorized to demand, sue for, receive and collect the rents, income and profits of any of the properties or contracts of said defendant, whether the same are now due or shall hereafter become due and payable, and that said Receiver be, and hereby is, authorized to do such things, enter into such agreements and employ such agents in connection with the management, care, preservation and operation of the properties of the defendant as he may deem advisable, and he is authorized to incur such expenses and make such disbursements as may in his judgment be necessary

or advisable in connection with the care, preservation, maintenance and operation of the properties of said defendant as a whole, and upon further application to this Court to borrow money (and give as security therefor any property and securities coming into his hands, including bills of lading, warehouse receipts, trust receipts and other documents of title) if needful in his judgment for any and all purposes for which he is authorized to expend money.

Tenth: That said Receiver be and hereby is authorized and empowered to institute, prosecute and defend, compromise, adjust, intervene in or become a party to such suits, actions, proceedings at law, in equity or in admiralty, including proceedings in State or Federal courts or courts of foreign nations, as may in his judgment be necessary or proper for the protection, maintenance and preservation of the assets of the defendant and the continuation, management and operation of its business as a whole or for the carrying out of the terms of this Decree, and likewise to defend, compromise or adjust, or otherwise dispose of any and all suits, actions or proceedings instituted against him as Receiver or against the defendant, and also [fol. 230] to appear in and conduct the prosecution or defense of any suit or adjust or compromise any actions or proceedings now pending in any court by or against the defendant where such prosecution, defense or other disposition of such suits, actions or proceedings will, in the judgment of said Receiver, be advisable or proper for the protection of the properties of the defendant, and in his discretion to compound and settle with all debtors of the defendant, with persons having possession of its property or in any way responsible at law or in equity to the defendant at the time of its suspension of business or otherwise, upon such terms and in such manner as he shall deem just and beneficial to said defendant and its creditors.

Eleventh: That said Receiver be and hereby is given a period of six (6) months from the date hereof within which to arrive at a determination as to what contracts and leases of the defendant he shall affirm or disaffirm, and within which time to make his election in that respect, this Court reserving the right, if so advised, to extend or diminish the time so granted to said Receiver from time to time within which to make such election. Such election may be made from time to time and shall be made by instrument

in writing subscribed by the Receiver and filed in the office of the Clerk of this Court, and no conduct or user of the rights by the Receiver or payments made by him, as rent or otherwise, or any other acts or omissions of the Receiver within said period of six months unaccompanied by the filing of such written instrument, shall be deemed to conclude the Receiver in respect of such election or be deemed to constitute an election to adopt or to continue in force any such contract, lease or agreement.

Twelfth: That said Receiver shall retain possession and continue to discharge the duties and trusts aforesaid until the further order of this Court in the premises; that he shall from time to time apply to this Court for such other and further orders and direction as he may deem necessary and requisite for the due administration of said trust, including the power to borrow money on receivers' certificates or otherwise and to give security therefor. [fol. 231] And said Receiver is hereby vested in addition to and without limitation of the powers aforesaid with all the general powers of receivers in cases of this kind, subject to the direction of this Court, and said Receiver shall from time to time or when directed by this Court render to this Court reports of his proceedings and accountings with respect to all moneys received and disbursed by him or his agents.

Thirteenth: That the plaintiff and the Receiver appointed herein are authorized to apply to any other court or courts of competent jurisdiction for such order or orders in the premises as either may deem necessary or proper in aid of the orders issued by this Court. The right is reserved to the parties hereto to apply, from time to time, to the Court for any further or other directions to said Receiver and this Court reserves the right and jurisdiction to make, from time to time, such further orders amplifying, extending, limiting, or otherwise modifying or changing this order as to it may at any time seem proper. In case of the death, resignation or removal of the Receiver hereby appointed and the appointment of a successor, all of the provisions of this order shall apply to such successor without further order or direction of the Court.

Fourteenth: That the bond of said Receiver in the sum of Seventy Five Thousand ($75,000.00) Dollars conditioned

that he will well and truly perform the duties of his office and duly account for all moneys and properties which may come into his hands and abide by and perform all things which he shall be directed to do herein and in any other proceedings wherein he may be appointed, with sufficient sureties to be approved by this Court, be forthwith filed with the Clerk of this Court.

Fifteenth: The Receiver is authorized to execute in his own name or in the name of the defendant, all necessary appeal, supersedeas, injunction or other bonds which may be required by law or in carrying out this order or any other orders of this Court and to that end enter into contracts with surety companies as sureties on such bonds and to pay the reasonable charges of such surety companies therefor [fols. 232-263] as well as any amounts he may be required to pay by reason of signing such bonds as sureties.

Sixteenth: All claims and demands against the defendant shall be presented to the Receiver within three months from the date of publishing notice as hereinafter provided. The Receiver shall give public notice accordingly by publication once in each of four successive calendar weeks upon any day in the week, in a newspaper published in the City of Ashland, State of Kentucky, of the time within which, the place where and the manner in which such claims and demands shall be so presented.

All persons failing to present their claims or demands against the defendant to the Receiver within said period of three months shall be barred from sharing the benefits of the distribution of the moneys and proceeds of the properties of the defendant that now are or hereafter shall be in the hands of the Receiver, and from sharing or participating in the distribution of any of the proceeds arising from the sale of the properties of the defendant if such sales shall be hereafter adjudged and decreed in this cause.

A. M. J. Cochran, U. S. D. J.

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[fol. 264] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

In Bankruptcy No. 115, Lexington

In the Matter of American Fuel and Power Company, Etc., Debtors

In Bankruptcy No. 989-B, Lexington

In the Matter of Inland Gas Corporation, Debtor

In Bankruptcy No. 991-B, Lexington

In the Matter of Kentucky Fuel Gas Corporation, Debtor

Findings of Fact and Conclusions of Law—Entered and Filed September 3, 1943

These causes having been heard together and being submitted upon the several petitions filed herein seeking rejection of the claims asserted in these proceedings by Columbia Gas and Electric Corporation against the Debtors, American Fuel and Power Company, Inland Gas Corporation and Kentucky Fuel Gas Corporation, respectively, and the Court having heard and considered the evidence presented by the parties bearing upon the issues involved, specially finds the Facts and separately states its Conclusions of Law thereon, as follows, to-wit:

FINDINGS OF FACT

1. The debtor, Inland Gas Corporation (hereinafter called Inland) was incorporated on March 31, 1927, for the purpose of engaging in the business of producing, transporting and selling natural gas to industrial consumers. The enterprise was entirely financed by the sale of its se-[fol. 265] curities to the public, the proceeds from which, after the payment of large financing and promotional expenses, it used to acquire natural gas reserves in Eastern Kentucky and to construct a transmission line from its gas fields to Ashland, Kentucky. In 1927, it issued and sold its 7% First Mortgage Bonds in the principal amount of $1,000,000 and an issue 7% cumulative preferred stock with an aggregate par value of $200,000. In 1928, it issued and sold its 6½% First Mortgage Sinking Fund Bonds, matur-

ing February 1, 1938, in the principal amount of $4,400,000 and its 7% Ten Year Debentures in the principal amount of $1,500,000. These securities were underwritten and sold to the public by a group of investment bankers. From the net proceeds derived from the 1928 financing, the corporation retired the securities issued in 1927. The entire issue of its common stock consisting of 341,775 shares was acquired by the promoters and underwriters as compensation for services. The underwriters also received for their services from 10 to 12 percent of the proceeds derived from the securities. The net returns to the corporation were further depleted by other promotional expenses. In 1930 it sold to the American Fuel and Power Company its 6% Gold Notes in the principal amount of $400,000.

2. The debtor, Kentucky Fuel Gas Corporation (hereinafter called Kentucky Fuel) was incorporated on May 17, 1928, primarily for the purpose of supplementing the business of Inland by the acquisition of certain natural gas producing property located in Eastern Kentucky, then owned by American Rolling Mill Company. The organization was promoted by the same persons who promoted Inland and likewise was entirely financed by the sale of securities to the public, consisting of 6½% First Mortgage Sinking Fund bonds maturing June 1, 1942, in the principal amount of $4,000,000 and 6½% Sinking Fund Debentures maturing June 1, 1938, in the principal amount of $1,000,000. These securities were marketed by some of the same group of bankers who financed Inland and upon the same terms. The common stock of the company, apportioned among the promoters and underwriters, consisted of 500,000 shares. Out of the net proceeds derived from the sale of these securities [fol. 266] the corporation paid $3,000,000 to the American Rolling Mill Company for its gas acreage.

3. The debtor, American Fuel and Power Company (hereinafter called American Fuel) was organized in July 1928 by the same group who promoted Inland and Kentucky Fuel for the purpose of taking over and holding the stock of these operating corporations and others planned to be organized, in order to integrate and expand their operations through unified control and management. The stockholders of Inland and Kentucky Fuel exchanged their stock, share for share, for stock in this holding company.

As of July 1, 1929, it issued and sold to the public 7% Convertible Gold Notes in the principal amount of $2,000,000 maturing July 1, 1934. It used the net proceeds derived from the sale of these notes to provide financial aid to Inland and Kentucky Fuel, and to acquire additional natural gas acreage, and transmission lines. It caused the organization of and financed additional subsidiary corporations for the purpose of having them acquire, hold and operate various properties, as follows, to-wit:

(a) Carbreath Gas Company, which acquired and held gas acreage in Southeastern Kentucky, together with gas gathering lines and equipment;

(b) Inland Gas Distributing Company, which constructed, held and operated a gas transmission line extending from Ashland, Kentucky, into Huntington, West Virginia, by means of which it transmitted natural gas purchased and received into its line from Inland at Ashland, Kentucky, to industrial consumers in Huntington and Kenova, West Virginia and vicinity;

(c) Buckeye Fuel Company, which held leases upon gas producing acreage in Lawrence County, Ohio, from which it supplied gas to Buckeye Gas Service Company;

(d) Buckeye Gas Service Company, which owned gas distributing lines in Ironton and Coalgrove, Ohio, by which it sold and distributed to industrial consumers gas supplied by Buckeye Fuel Company and Kentucky Fuel, and

(e) Kentucky Drilling Company, which was principally utilized to carry on drilling operations.

[fol 267] As the parent corporation, American Fuel, held all the capital stock of these subsidiaries, and with them, together with Inland and Kentucky Fuel, made up the so-called "American Fuel System."

4. During the period covered by the events involved in this litigation, Columbia Gas and Electric Corporation (hereinafter called Columbia), through its numerous owned and controlled subsidiary corporations, engaged in the production, transmission, distribution and sale of natural gas to both industrial and domestic consumers in Kentucky, West Virginia, Ohio, Indiana and other states. With its subsidiaries connected by interstate transmission lines and

integrated through unified control of management and operation, it constituted a huge unitary interstate enterprise generally known as the "Columbia System."

5. Columbia's subsidiaries, which were engaged in selling fuel gas, served both domestic and industrial consumers as public utilities, and hence were subject to the rules and regulations of State Public Utility Commissions as well as the provisions of municipal franchises under which they operated. The result was they could not contract with industries for continuous service or fixed rates over a period of years by reason of the power of state and municipal authorities to change their rates from time to time and to require them to give preference to domestic consumers over industrial consumers when, by reason of cold weather or other conditions, the supply of natural gas was insufficient for both. Service to industries constituted a substantial part of their business.

6. The subsidiaries of American Fuel served only industrial users under private agreements. All plans for expansion and development of the American Fuel System were projected upon a strict adherence to that policy. By so limiting operations, they were free from the handicap of municipal franchises and regulation by utility boards and commissions. Consequently they had a substantial competitive advantage over Columbia's subsidiaries wherever, operating in the same territory, they came into competition with each other for the business of industrial consumers.

[fol. 268] 7. Prior to the organization of the American Fuel System, Columbia enjoyed virtual freedom from actual or threatened competition of a serious nature in the fields occupied by its subsidiaries in the states of Kentucky, Ohio and West Virginia. During the years 1928, 1929 and until November 1930, American Fuel and its subsidiaries engaged in actual competition in interstate commerce of a substantial nature with Columbia and certain of its subsidiaries in the production, transmission and sale of natural gas to industrial consumers in the states of West Virginia, Kentucky and Ohio, and also in the acquisition of natural gas acreage in the gas fields of Eastern Kentucky. As a result of the competitive advantages enjoyed by American Fuel it was able to and did take away from Columbia the American Rolling Mill Company, the largest industrial customer of

one of its subsidiaries in Kentucky, and many of the largest industrial customers of its subsidiary in Huntington, West Virginia, and vicinity. By the end of 1929, this competition had become so serious and threatening as to cause Columbia to consider and inaugurate measures to combat it.

8. During 1929-30, Columbia was engaged in the development of a plan for the construction of a pipe line for transmission of natural gas from its Kentucky-West Virginia fields to the eastern seaboard cities of Washington, Baltimore and Philadelphia (hereinafter referred to as The Seaboard Line). This project, as originally planned, called for a large increase in Columbia's holding of gas reserves in West Virginia and Eastern Kentucky and to that end Columbia entered upon a large scale program for increasing its gas acreage in that territory. It considered that the gas acreage held by American Fuel and its subsidiaries would be a desirable adjunct to its system.

9. Both Inland and Kentucky Fuel sustained substantial operating losses in 1928 and 1929. Due to their heavy burden of securities and burdensome gas contract entered into with Hamilton Gas Company and Piney Oil and Gas Company, Inland, Kentucky Fuel and American Fuel were never able to earn their fixed charges. Columbia acquired knowledge of the precarious financial position of American [fol. 269] Fuel and its subsidiaries, and that the indentures securing the bonds of Inland and Kentucky Fuel provided that after their failure to meet interest or sinking fund requirements, upon the request of the holders of 25 percent in principal amount of the bonds, the indenture trustees should declare defaults to have occurred and institute foreclosure proceedings. Anticipating such eventuality and in order to place itself in a position to force foreclosure and sale of its properties and afford it an opportunity to purchase them at a foreclosure sale, in January 1930, Columbia began to purchase bonds of Inland and Kentucky Fuel on the open market by methods which concealed the fact that it was the purchaser. By the end of April 1930, it had acquired in excess of 25 percent in principal amount of the bonds of both.

10. From the beginning of their operations, Inland and Kentucky Fuel were under the supervision and management of Hope Engineering Company (hereinafter called

"Hope"), an organization with wide experience in building natural gas transmission lines and successfully promoting natural gas enterprises. It recognized the dubious financial condition of American Fuel and its subsidiaries and realized that its only hope of survival was to secure capital to bridge over its immediate difficulties and to finance a large expansion of its business. It considered the industrial area in and around the city of Detroit, Michigan, which was not then supplied with natural gas, an inviting field, and recommended to American Fuel that an effort be made to enter this field. Plans to that end were promptly formulated. "Hope" succeeded in inducing American Utilities and General Corporation and Moody-Seagraves Company to join in the promotion of the project, as the result of which this group (hereinafter referred to as "The Syndicate") united their resources and combines their efforts in an ambitious plan to construct a natural gas transmission pipe line extending from the gas fields of Eastern Kentucky through the heart of the territory then occupied and served by the subsidiaries of Columbia to the city of Detroit for sale and distribution of natural gas to industrial enterprises along the way, as well as in the [fol. 270] Detroit industrial area. The American Utilities and General Corporation was a prosperous and successful investment trust backed and controlled by G. E. Barrett & Company, a strong banking organization which had financed many gas enterprises throughout the country. Moody-Seagraves Company was an organization which had successfully built and operated natural gas projects and enjoyed wide experience in the promotion of such enterprises. This Syndicate constituted a sufficient combination of financial strength and business experience to foreshadow success of the proposed plans and thereby prevent the impending financial collapse of the American Fuel System as anticipated by Columbia.

The Syndicate acquired from Freeman, Smith & Camp Company voting trust certificates representing 450,000 shares of American Fuel stock and American Fuel notes in the principal amount of $60,000, for all of which it paid $154,000. It also acquired from American Fuel 1,000,000 shares of its newly issued common stock for which it paid $500,000. These acquisitions gave the Syndicate, as owner of the majority of its outstanding stock, complete control of the American Fuel System. To prevent default in cer-

tain maturing obligations of American Fuel, Inland and Kentucky Fuel "Hope" agreed to provide funds sufficient to meet their immediate sinking fund requirements. Operations of the Syndicate were carried on by and through corporations which it wholly owned and controlled, to-wit: Northern Gas Company, an Ohio corporation, Northern Industrial Gas Company, a New York corporation, Howe Oil and Gas Company, and Northern Gas Company, a Delaware corporation. Through one of its corporations, the Syndicate applied for a franchise to lay its gas pipe lines in the streets of the city of Detroit and entered upon a vigorous compaign to secure contracts from industrial consumers in the city of Detroit and vicinity, as well as in the territory through which the proposed gas line would be constructed. Through another of its corporations, it surveyed and acquired the right of way for its transmission line from the gas fields of Eastern Kentucky, including the necessary permits for river crossings, and started the work of laying pipes under the Ohio River. Through [fol. 271] another of its corporations, Howe Oil and Gas Company, it started the acquisition of additional gas acreage in the Eastern Kentucky fields to supplement the holdings of the American Fuel System.

The Syndicate planned to provide the money necessary to advance the project to a point where its successful completion and profitable operations could be demonstrated and then sell to the public a bond issue sufficient to finance completion. Contracts for the sale of natural gas were secured from industrial consumers not only in the Detroit area but in the territory adjacent to the proposed line. Ralph K. Davis, a nationally known and highly reputable natural gas engineer, was employed to investigate and analyze the proposed enterprise and, after making an exhaustive survey of it in its entirety, he reported: "* * * the gas reserves are sufficient, the industrial market is adequate and * * * this project as a whole is a sound business proposition, which will be profitable to the gas company as well as an economic advantage to the industries of Toledo and Detroit."

11. During the time the plans of the Syndicate were maturing, Columbia was also making plans to supply natural gas from its Kentucky and West Virginia fields to the Detroit area. It made a survey of the market in Detroit

and, while the application of the Syndicate for a franchise in Detroit was pending, the Executive Committee of Columbia passed a resolution providing for an extension of its existing gas transmission lines from Toledo to Detroit.

12. The plans, which Columbia contemplated for the development of its business in the Detroit field and for the maintenance of its subsisting monopolistic position in fields occupied by its subsidiaries, were not only seriously threatened by the plans of the Syndicate for the development of the American Fuel System, but also by the starting of a large pipe line for the transmission of natural gas from the gas fields of the Texas Panhandle and the Hugoton Gas fields of Kansas which was purposed to be extended into the states of Ohio, Michigan and Indiana and make natural gas available from these sources not only to cities in Indiana and Ohio, which were then sup- [fol. 272] plied by Columbia, but also to the city of Detroit toward which Columbia was looking and planning. Furthermore, United Carbon Company, a corporation which owned gas acreage in Eastern Kentucky, had announced its intention to build a natural gas pipe line from its fields to the city of Cincinnati, Ohio, for the purpose of supplying gas to that city in competition with Columbia and has proposed to furnish natural gas to a number of Columbia's customers in the Cincinnati area at a substantially reduced rate. The threat of competition by United Carbon Company in the Cincinnati area was averted by Columbia arranging for its subsidiary, Warfield Natural Gas Company, to buy all the gas controlled by United Carbon Company. It met the formidable threat of serious competition from the Texas and Hugoton gas fields of the Southwest by using one of its subsidiaries, Columbia Oil and Gasoline Corporation, to purchase complete control of that project entailing an investment of more than $30,000,000. It continued its efforts to covertly gain a commanding position in the financial structure of the American Fuel System until it acquired approximately 42% of the outstanding bonds and debentures of Kentucky Fuel and approximately 36% of the outstanding bonds and debentures of Inland, representing an aggregate expenditure of between three and four million dollars.

13. On October 30, 1930, Columbia entered into a written contract with the Syndicate (which was consum-

mated on November 6, 1930), under the terms of which, for the consideration of $2,826,789.28, it purchased the Syndicate's entire holdings in the American Fuel System and all other corporations which had been organized by the Syndicate for the promotion and development of its Detroit project consisting of 76% of the outstanding common stock of American Fuel and all of the outstanding stock of Howe Oil and Gas Company, Bridge Gas Company, Northern Gas Company (Ohio), Northern Gas Company (Delaware) and Northern Industrial Company, together with all claims and securities held by the members of the Syndicate against American Fuel and its subsidiaries. The price paid by Columbia represented the total amount [fol. 273] invested by the Syndicate and a clear profit of $350,000. Under the terms of the contract and in consideration thereof, Columbia guaranteed to employ "Hope" to perform natural gas engineering work on at least $20,000,000 of construction projects within a period of three years, for which it agreed to pay "Hope" a compensation of 4%, an obligation which it later discharged by paying "Hope" $400,000 without any work being done by "Hope." Also under the terms of the contract, the Syndicate delivered resignations of all officers and directors of American Fuel and its subsidiaries and the other associated corporations, the stock control of which was acquired by Columbia under the contract, and they were replaced by persons designated by Columbia. Nominees of Columbia were made voting trustees of the majority of the capital stock of Kentucky Fuel under a subsisting voting trust agreement, Columbia agreed to hold the members of the Syndicate harmless by reason of the obligation of "Hope" to provide funds to meet sinking fund requirements of Inland and Kentucky Fuel and in respect to any obligations imposed by gas sales contracts entered into with industrial customers in Detroit and elsewhere and from obligations imposed under leases entered into by Hope Oil and Gas Company for gas acreage. It also agreed to hold the Syndicate harmless as to the obligations under Inland's gas purchase contracts with Hamilton Gas Company and Piney Oil and Gas Company. By the use of certain claims thus acquired Columbia promptly precipitated receivership proceedings against Inland and Kentucky Fuel which resulted in having them placed in the hands of Columbia's nominee,

W. E. Lockhart, as receiver. This resulted in immediate discontinuance of all efforts to promote the Detroit project, and in curtailment of further extension of the subsisting competition between the subsidiaries of Columbia and American Fuel. Subsequently Columbia caused American Fuel and its other subsidiaries to be placed in receivership. For a considerable period, the activities of the receiver of Inland, Kentucky Fuel and also of American Fuel and its other subsidiaries, both of whom were nominees of Columbia, were largely dominated by Columbia.

[fol. 274] 14. Negotiations, pursuant to which Columbia acquired from the Syndicate control of the American Fuel System, were inaugurated by O. R. Seagraves, President of Moody-Seagraves Company, whose confidence in the ability of the Syndicate to successfully carry out its plans for the Detroit project had been considerably shaken by reason of the financial depression throughout the country and the depleted financial strength of the members of the Syndicate by reason thereof. The other members of the Syndicate did not fully share the views of Mr. Seagraves and the principal inducements leading them to agree to the deal with Columbia were the large profits realized from it by them. A collateral inducement to Mr. Seagraves was the prospect of his making a profitable contract with Columbia to take gas from fields located in the Southwest in which he was interested.

15. Prior to the sale of its holdings to Columbia under the contract of October 30, 1930, although the Syndicate was encountering unexpected obstacles and difficulties in the promotion of its plans for the Detroit project, it had not abandoned them and they constituted a sufficient menace and threat to Columbia to include Columbia to make the deal highly profitable to members of the Syndicate. But for the consummation of this transaction, the Syndicate was ready, able and willing to continue its efforts to develop the project. Whether it would have ultimately succeeded is a matter which lies entirely in the realm of speculation.

16. Prior to Columbia's acquisition of domination and control of the American Fuel System in the manner hereinbefore stated, it had asserted through certain of its responsible executive officers, in substance and effect that it

would not lie idly by and permit the construction of a pipe line through the heart of its territory as proposed by the Syndicate.

17. On and prior to January 1, 1930, and continuing throughout the year 1930 and thereafter, Columbia, together with its executive officers, directors and certain of its corporate subsidiaries, was engaged in a conspiracy, the object, purpose and effect of which was to restrain and [fol. 275] monopolize trade and commerce in natural gas in and between the states of Kentucky, Ohio, West Virginia, Indiana and Michigan, and the claims herein presented and asserted by and on behalf of Columbia against the debtors, American Fuel, Inland, and Kentucky Fuel, were acquired pursuant to and in accomplishment of the aims and purposes of that conspiracy. Any plans to acquire and utilize the properties of the American Fuel System as a legitimate adjunct to the Columbia System were merely collateral and incidental to the main purpose of the conspiracy to restrain actual and potential interstate competition in the production, transportation, distribution and sale of natural gas.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the parties and the subject matter of this proceeding, and in the exercise of its discretion was empowered to authorize and permit intervention herein by the United States.

2. A conspiracy to violate the Anti-trust Laws of the United States may be established by circumstantial evidence if the circumstances disclosed point unerringly to the existence of such conspiracy and can be satisfactorily explained upon no other reasonable hypothesis. The fact and circumstances disclosed in this case are sufficient, under this test, to warrant the finding of conspiracy as stated in paragraph No. 17 of the Findings of Fact.

3. The conspiracy, pursuant to which Columbia acquired the claims herein asserted against the debtor, as found and described in paragraph No. 17 of the Findings of Fact was in violation of the Anti-trust Laws of the United States, to-wit: The Sherman Act and The Clayton Act.

4. The following conclusions of law stated by the Circuit Court of Appeals of the Sixth Circuit in its opinion,

In re American Fuel and Power Company, 122 F. (2d) 223, are here applicable and controlling, to-wit:

(a) "It is the duty of the Bankruptcy Court in reorganization proceedings to withhold its aid from [fol. 276] parties seeking to obtain a benefit from an agreement tinged with illegality."

(b) "* * * the courts will not lend their assistance in any way toward carrying out the terms of a contract the inherent purpose of which is to violate the law and they likewise will refuse to enforce any right directly springing from such a contract, although such right be legal."

(c) "Equity will not permit one to rely on his wrongful act as against those affected by it, but not participating therein, to support his own asserted legal title."

(d) "The claim of a creditor or the interest of a stockholder which is invalid because it is based on or arises out of an illegal or criminal transaction, is not provable or allowable in bankruptcy reorganizations."

(e) "Under the facts in this record no principle of equity, morals or law requires the court to approve the present claims or stock interests of the Columbia and this court should not lend its aid to further a scheme abhorrent to all recognized rules of right and justice as the facts here show."

5. Judgment should be entered rejecting all claims asserted herein by Columbia against the debtors and adjudging that Columbia take nothing thereby.

H. Church Ford, Judge.

[fol. 277] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

In Bankruptcy No. 115 Lexington

In the Matter of AMERICAN FUEL AND POWER COMPANY, etc., Debtors

In Bankruptcy No. 989-B Lexington

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991-B Lexington

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

ORDER STRIKING FROM FINDINGS OF FACT LAST TWO SENTENCES OF PARAGRAPH 13—Filed September 22, 1943

It is ordered by the Court that the following sentences, being the last two sentences of paragraph 13 of the Findings of Fact herein filed by the Court on September 3, 1943, be and are hereby withdrawn and stricken therefrom, to-wit:

> "Subsequently Columbia caused American Fuel and its other subsidiaries to be placed in receivership. For a considerable period, the activities of the receiver of Inland, Kentucky Fuel and also of American Fuel and its other subsidiaries, both of whom were nominees of Columbia, were largely dominated by Columbia."

(S.) H. Church Ford, Judge

[fol. 278] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtors

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

JUDGMENT—Entered and Filed October 30, 1943

These proceedings came on to be tried before the Court and evidence introduced by the parties and arguments of counsel having been heard, and the Court having made and filed its Findings of Fact and Conclusions of Law, it is hereby ordered and adjudged as follows:

1. That any and all claims of Columbia Gas and Electric Corporation filed by it or in its behalf in these proceedings against the debtors, or any of them, and any stock interest of Columbia Gas and Electric Corporation in the debtors, or any of them, or any of their subsidiaries be, and the same are hereby, rejected.

2. That all monies heretofore withheld or impounded on prior distributions by the trustees of the estate of the debtors herein, or any of them, for and on account of the Columbia Gas and Electric Corporation, pending the adjudication of its claims herein, be returned to and made a part of the estate of the debtor from which they came and be distributed in accordance with law.

3. The parties hereto seeking the rejection of the claims of Columbia Gas and Electric Corporation against the [fol. 279] debtors, or any of them, shall recover from Columbia Gas and Electric Corporation their costs herein expended arising out of or relating to the claims filed by Columbia Gas and Electric Corporation against the debtors herein, or any of them.

4. Columbia Gas and Electric Corporation objects and excepts to this judgment.

H. Church Ford, Judge

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtors

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

NOTICE OF APPEAL—Filed June 9, 1944

Please Take Notice that Louis A. Green and Robert Heilbrunn, as an Independent Protective Committee, representing certain holders of American Fuel and Power Committee Secured 7% Convertible Gold Notes and Certificates of Deposit, known in these proceedings as the [fol. 280] Green Committee, and Morris Green, a creditor of Inland Gas Corporation, and of Kentucky Fuel Gas Corporation, debtors above named, hereby appeal to the United States Circuit Court of Appeals for the Sixth Circuit from so much of the order and judgment made by Hon. H. Church Ford, United States District Judge for the United States District Court, Eastern District of Kentucky, and filed May 13th, 1944, as makes the following findings of fact and conclusions of law: Findings of Fact Numbers II and III, and Conclusions of Law Numbers I, II, III, IV, VI and VIII; and the appellants further appeal from the order and judgment above named because of the failure of the court below: to ascertain and determine the amount of cash on hand and in banks, bills, notes and accounts receivable, credits, claims, choses in action, small tools and inventories owned by Inland Gas Corporation as of December 2, 1930, upon the appointment of W. E. Lockhart as equity receiver; to ascertain and determine the respective sums or values out of the cash on hand and securities held by the trustee of Inland Gas Corporation and accruing (a) through the operation of the properties owned by Inland Gas Corporation prior to the appointment of the equity receiver; (b) through the operation of gas properties sub-

sequently acquired by the equity receiver or the trustee in bankruptcy; (c) through the purchase of gas not produced from property owned or leased by Inland Gas Corporation, the equity receiver or trustee thereof; to determine the extent and value of the security under the mortgage or deed of trust made by Inland Gas Corporation as of the date of the filing of the petition in bankruptcy under Section 77B of the Bankruptcy Act as amended; to find and conclude that the value of the claims of Columbia Gas & Electric Corporation rejected by the judgment of the Court by decree made and entered October 30, 1943, enures to the benefit of general creditors of Inland Gas Corporation; to find and conclude that the holders of Inland Gas Corporation first mortgage bonds were entitled to no interest on their claims out of general assets of the estate unless creditors junior to said first mortgage receive payment in full with interest; and erred in failing to find and conclude [fol. 281] that said first mortgage bondholders were entitled to no interest subsequent to the date of the filing of the petition in bankruptcy, to-wit, October 15, 1935; to ascertain and determine the properties acquired by the estate of Inland Gas Corporation during the equity receivership and the trusteeship in bankruptcy to enable the creditors in interest to ascertain their respective rights in the classification of claims and their participation right in a reorganization; and to ascertain and determine the validity and the amount due, if any, upon general claims asserted and filed against Inland Gas Corporation by American Fuel and Power Company and its subsidiary, Carbreath Gas Company; and the said appellants, upon their petition, have been granted leave to take this appeal in their own names and at their own expense pursuant to order of the Hon. H. Church Ford, Judge of the United States District Court for the Eastern District of Kentucky made and filed June 3, 1944.

Dated: New York,
June 7th, 1944.

Yours, etc. Baker, Obermeier, Rosner & Rosenson, Attorneys for the above named Green Committee and Morris Green, Appellants. Office & P. O. Address, 285 Madison Avenue, Borough of Manhattan, City of New York.

[fol. 282] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY—Filed June 9, 1944

1. The Court erred in Finding of Fact No. II holding that the mortgage or deed of trust therein mentioned gave the bondholders a first lien on all after acquired property and the net earnings from the conduct of the business of Inland Gas Corporation.

2. The Court erred in Finding of Fact No. III that the cash on hand and securities held by the trustee of Inland Gas Corporation were acquired through the operations and in the manner therein found.

3. The Court erred in its Conclusion of Law No. I in adjudging that the mortgage or deed of trust therein mentioned gave to the Inland Gas Corporation first mortgage bondholders a first lien not alone on all property described in said mortgage or deed of trust but as well on all after acquired property and net earnings of Inland Gas Corporation of the equity receiver and of the trustee in bankruptcy thereof.

4. The Court erred in Conclusion of Law No. II in adjudicating that the first mortgage bondholders of Inland Gas Corporation have a first lien on the properties acquired by the equity receiver and by the trustee in bankruptcy of said corporation; and in adjudicating that said properties were acquired pursuant to appropriate orders of the Court and paid for out of funds otherwise applicable to the payment of the first mortgage bonds and coupons and interest thereon.

5. The Court erred in Conclusion No. III in adjudicating that the net earnings derived by the bankruptcy trustee and by the equity receiver of Inland Gas Corporation from the operation of the property owned by Inland Gas Corporation and of property acquired subsequently by said receiver and trustee and from the purchase and sale of gas are subject to the lien of the Inland Gas Corporation first mortgage; and further erred in adjudicating that said funds are held for the benefit of the first mortgage bondholders until their bonds, coupons and all interest thereon are paid in full.

[fol. 283] 6. The Court erred in Conclusion No. IV in adjudicating that the Inland Gas Corporation first mortgage bonds and coupons attached thereto bear simple interest at the rate provided in the mortgage or deed of trust from the due dates of the said bonds and coupons until paid.

7. The Court erred in Conclusion No. VI in adjudicating that neither the debenture holders nor the general claimants have any right to participate in, or share with the first mortgage bondholders in the distribution of the income or assets of Inland Gas Corporation until the first mortgage bonds and coupons attached thereto are paid in full with interest thereon as therein mentioned.

8. The Court erred in Conclusion No. VIII in adjudicating that the net earnings from the sale of gas from property of Inland Gas Corporation including property acquired by the equity receiver and trustee in bankruptcy and all accruals and profits and net earnings as therein described are subject to the lien of the mortgage or deed of trust and that all property so acquired and all cash and securities held by the trustee are to be held and applied to the payment of Inland first mortgage bonds and coupons attached thereto and interest thereon until said bonds, coupons and interest shall have been paid in full.

9. The Court erred in failing to ascertain and determine the amount of cash on hand and in banks, bills, notes and accounts receivable, credits, claims, choses in action, small tools and inventories owned by Inland Gas Corporation as of December 2, 1930, upon the appointment of W. E. Lockhart as equity receiver.

10. The Court erred in failing to ascertain and determine the respective sums or values out of the cash on hand and securities held by the trustee of Inland Gas Corporation and accruing (a) through the operation of the properties owned by Inland Gas Corporation prior to the appointment of the equity receiver; (b) through the operation of gas properties subsequently acquired by the equity receiver or the trustee in bankruptcy; (c) through the purchase of gas not produced from property owned or leased by Inland Gas Corporation, the equity receiver or trustee thereof.

[fol. 284] 11. The Court erred in failing to determine the extent and value of the security under the mortgage or deed

of trust made by Inland Gas Corporation as of the date of the filing of the petition in bankruptcy under Section 77B of the Bankruptcy Act as amended.

12. The Court erred in failing to find and conclude that the value of the claims of Columbia Gas & Electric Corporation rejected by the judgment of the Court by decree made and entered October 30, 1943 enures to the benefit of general creditors of Inland Gas Corporation.

13. The Court erred in failing to find and conclude that the holders of Inland Gas Corporation first mortgage bonds were entitled to no interest on their claims out of general assets of the estate unless creditors junior to said first mortgage receive payment in full with interest; and erred in failing to find and conclude that said first mortgage bondholders were entitled to no interest subsequent to the date of the filing of the petition in bankruptcy, to wit, October 15, 1935.

14. The Court erred in failing to ascertain and determine the property acquired by the estate of Inland Gas Corporation during the equity receivership and the trusteeship in bankruptcy to enable the creditors in interest to ascertain their respective rights in the classification of claims and their participation right in a reorganization.

15. The Court erred in failing to ascertain and determine the validity and the amount due, if any, upon general claims asserted and filed against Inland Gas Corporation by American Fuel and Power Company and its subsidiary, Carbreath Gas Company.

Dated: June 7th, 1944.

Yours, etc. Baker, Obermeier, Rosner & Rosenson,
Attorneys for Louis A. Green and Robert Heilbrunn as an independent protective committee, etc., and Morris Green, Appellants.

To: Clerk of the above named Court.

[fol. 285] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtors

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

ORDER

This cause coming on to be heard upon the petition of Lewis A. Green and Robert Heilbrunn, as an independent protective committee representing certain holders of American Fuel and Power Company secured 7% convertible notes and certificates of deposit commonly known as the Green Committee and Morris Green, a creditor of Inland Gas Corporation and of Kentucky Fuel Gas Corporation, for leave to appeal from the United States District Court for the Eastern District of Kentucky to the United States Circuit Court of Appeals of the Sixth Circuit in the name of Clinton M. Harbison, Trustee for the American Fuel and Power Company, etc., and in the name of Ben Williamson, Jr., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation, from the judgment entered by this Court on May 13, 1944, and Clinton M. Harbison, Trustee as aforesaid, and Ben Williamson, Jr., Trustee as aforesaid, each having filed a response to a show cause order of this Court entered on the 26th day of May, 1944, in which they and each of them declined to take an appeal from said judgment and objected to an appeal being taken therefrom in [fol. 286] their names as such trustees for reasons set out in their respective responses, and the Court having heard the parties and being advised, it is ordered and adjudged that the petitioners be and are hereby authorized to appeal in their own names and at their own expense. And it is further ordered that any other creditors of the same class of any of the debtors herein shall have a right to join in said appeal.

It is further ordered that leave of the petitioners to appeal in the name of either of the trustees is denied.

H. Church Ford, Judge.

June 3, 1944.

Certified: A. B. Rouse, Clerk.

[fol. 287] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtors

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

DESIGNATION—Filed June 9, 1944

Appellants, the Green Committee and Morris Green, designate the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Petition by the VanHorn Committee for distribution to first mortgage bondholders of Inland Gas Corporation verified October 11th, 1943, and filed November 3rd, 1943.

2. Response thereto by, and petition for advice of, Ben Williamson, Jr., as trustee of Inland Gas Corporation filed December 3rd, 1943.

3. Response of the Green Committee verified December 30th, 1943, and duly filed.

4. Stenographer's transcript of the hearings on application for distribution pursuant to petition filed by the VanHorn Committee November 3rd, 1943, which hearings took place on April 11th and April 12th, 1944, covering 258 typewritten pages of said transcript.

5. Bill of complaint with mortgage or deed of trust attached thereto as an exhibit filed on or about April 15,

1931, in which complaint Chatham-Phoenix National Bank and Trust Company and James F. McNamara are plaintiffs, [fol. 288] and Inland Gas Corporation, et al., are defendants, together with letters dated April 3rd, 1931 addressed to Inland Gas Corporation and W. E. Lockhart, receiver, referred to in paragraph 13th of said foreclosure complaint, and petition for order appointing receiver and consolidating causes; and order thereon appointing receiver and consolidating causes dated and filed April 15th, 1931 (need not be printed but may be handed to the Court at time of argument).

6. Statements of or reports by W. E. Lockhart as receiver in equity as to the asset and liability or financial position of Inland Gas Corporation as at December 2nd or 3rd, 1930 duly filed herein.

7. Statements or comparative statements of profit and loss surplus of Inland Gas Corporation (combined accounts of corporation, receiver and trustee) covering the period from May 5th, 1927 to and including December 31st, 1943.

8. Comparative balance sheet of Inland Gas Corporation (combined accounts of corporation, receiver and trustee) for the years ending December 31st, 1927 through to December 31st, 1943.

9. Report of Ben Williamson, Jr. as trustee of Kentucky Fuel Gas Corporation dated November 4th, 1938 with condensed balance sheet annexed thereto as of September 30th, 1938 duly filed herein.

10. Order of this Court filed November 5th, 1938 directing a hearing on December 3rd, 1938 on the report dated November 4th, 1938.

11. Order filed December 3rd, 1938 approving the report filed November 4th, 1938 and directing the sale of the physical assets of Kentucky Fuel Gas Corporation for cash to the highest bidder to be held on January 14th, 1939.

12. Order filed January 7th, 1939 authorizing Ben Williamson, Jr. as trustee of Inland Gas Corporation to bid $151,192.48 for the physical assets of Kentucky Fuel Gas Corporation.

13. Report by Ben Williamson, Jr. filed December 31st, 1939 as to the bid by him as trustee of Inland Gas Corporation for the physical assets of Kentucky Fuel Gas Corporation.

[fol. 289] 14. Order filed February 4th, 1939 directing trustee of Inland Gas Corporation to pay out $151,192.48 for physical assets of Kentucky Fuel Gas Corporation.

15. Order filed February 4th, 1939 authorizing trustee of Kentucky Fuel Gas Corporation to convey physical assets of that company and confirming sale to trustee of Inland Gas Corporation of such assets at the price of $151,192.48.

16. Bill of complaint by Miles & Gibson as plaintiffs, against Inland Gas Corporation, defendant, in equity, praying for the appointment of a receiver and filed December 2nd, 1930.

17. Order entered thereon December 2nd, 1930 appointing W. E. Lockhart equity receiver.

18. Bill of complaint, American Rolling Mills Company, plaintiff, and Kentucky Fuel Gas Corporation, defendant, in equity, praying for the appointment of a receiver and filed December 2nd, 1930; and order entered thereon December 2nd, 1930 appointing W. E. Lockhart equity receiver.

19. Report and supplemental report by Stone & Webster Engineering Corporation respectively dated November 24th, 1934 and December 6th, 1935, and filed December 7th, 1935, and second supplemental report of Stone & Webster Engineering Corporation dated March 30th, 1937 and filed April 1st, 1937 (need not be printed but may be handed to Court at time of argument).

20. Order filed October 26th, 1935 approving petition in bankruptcy for reorganization of Inland Gas Corporation and appointing W. E. Lockhart temporary trustee in bankruptcy.

21. Order filed November 1st, 1935 approving petition in bankruptcy for reorganization of Kentucky Fuel Gas Corporation and appointing W. E. Lockhart temporary trustee in bankruptcy.

22. Order filed November 23rd, 1935 in Inland Gas Corporation and Kentucky Fuel Gas Corporation reorganization proceedings making W. E. Lockhart permanent trustee of each company.

[fol. 290] 23. Order filed June 26th, 1937 appointing Ben Williamson, Jr. sole trustee of Inland Gas Corporation.

24. Findings of fact and conclusions of law made and filed September 3rd, 1943 in the above entitled consolidated proceedings rejecting the claims of Columbia Gas & Electric Corporation, and order filed September 23rd, 1943 striking from said findings of fact.

25. Judgment filed October 30th, 1943 in the above entitled consolidated proceedings rejecting claims of Columbia Gas & Electric Corporation.

26. Order and judgment containing findings of fact and conclusions of law filed May 13th, 1944, following hearings on VanHorn's Committee petition for distribution filed November 3rd, 1943.

27. Notice of Appeal on behalf of the Green Committee and Morris Green dated June 7th, 1944.

28. Statement of points on which appellants intend to rely.

29. Order made June 3rd, 1944, on petition of the Green Committee and Morris Green verified May 24th, 1944 granting leave to appellants to appeal.

30. This designation.

31. Stipulations with respect to this record on appeal.

[fol. 291] IN UNITED STATES DISTRICT COURT

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtors

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

ORDER—Entered and Filed June 22, 1944

Upon motion of Louis A. Green and Robert Heilbrunn acting as an independent protective committee and known in these proceedings as the Green Committee and Morris Green, appellants, appealing from the order and judgment of this Court entered May 13, 1944, and the Court having been advised in the premises, said motion be, and the same hereby is granted; and it is

Ordered that for the purpose of said appeal the above entitled causes be, and the same hereby are consolidated and the said appellants and any other appellants and parties to said appeal be, and they hereby are permitted to prosecute said appeal upon one record.

Dated: Lexington, Kentucky, June 22, 1944.

H. Church Ford, U. S. D. J.

[fol. 292] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY, LEXINGTON

No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtors

No. 989

In the Matter of INLAND GAS CORPORATION, Debtor

No. 991

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

ORDER—Filed July 27, 1944

It appearing to the Court that the Clerk is in receipt of a certified copy of an order dated July 18, 1944 from the Clerk of the U. S. Circuit Court of Appeals, Sixth Circuit, Cincinnati, Ohio, ordering that the printing of the following document as part of the record on appeal be dispensed with:

> Bill of Complaint in which Chatham-Phenix National Bank and Trust Co. and James F. McNamara are Plaintiffs and Inland Gas Corporation, et al., are defendants annexed to which are a mortgage or deed of trust, a petition for an order appointing receiver and consolidating causes, and an order thereon appointing receiver and consolidating causes, all contained in a printed and bound volume, and filed April 15, 1931;
>
> Report of Stone & Webster Engineering Corporation, dated November 24, 1934, and filed December 7, 1935, and supplemental report of Stone & Webster Engineering Corporation, dated December 6, 1935 and filed Dec. 7, 1935 and Second Supplemental Report of Stone & Webster Engineering Corporation dated March 30, 1937, and filed April 1, 1937.

[fol. 293] And in accordance with the order of the U. S. Circuit Court of Appeals, the Clerk of this court is directed to forward to the Clerk of the U. S. Circuit Court of Appeals, Sixth Circuit, Cincinnati, Ohio, the original documents on file as above set out, and when the documents have

served their purposes, to be returned to the Clerk of this Court and filed with the papers in the above cases.

(S.) H. Church Ford, Judge U. S. District Court.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtors

In Bankruptcy No. 989

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

ORDER—Filed July 27, 1944

Upon reading and filing the annexed affidavit of Oscar S. Rosner, duly sworn to the 11th day of July, 1944, with copy of a stipulation annexed thereto, and upon all the proceedings herein, it is hereby

[fol. 294] Ordered that the printing of the following documents as part of the record on appeal herein be and the same hereby is dispensed with: Bill of Complaint in which Chatham-Phenix National Bank & Trust Company and James F. McNamara are plaintiffs, and Inland Gas Corporation, et al., are defendants, annexed to which are a mortgage or deed of trust, a petition for order appointing receiver and consolidating causes, and an order thereon appointing receiver and consolidating causes, all contained in a printed and bound volume, and filed on or about April 15, 1931; and a report and supplemental report by Stone & Webster Engineering Corporation, respectively, dated November 24, 1934 and December 6, 1935, and filed December 7, 1935 and second supplemental report of Stone & Webster Engineering Corporation dated March 30, 1937 and filed April 1, 1937; and it is further

Ordered that the said documents on file with the Clerk of the United States District Court for the Eastern District

of Kentucky be transmitted by said Clerk to this Court in lieu of printing thereof in the record on appeal.

Dated July 18, 1944.

Xen Hicks, Judge of the United States Circuit Court of Appeals, Sixth Circuit.

A true copy. Attest:

J. W. Menzies, Clerk U. S. C. C. A., Sixth Circuit, by Carl W. Reuss, Chief Deputy Clerk.

[fol. 295] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtors

In Bankruptcy No. 989

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

STIPULATION—Filed July 27, 1944

It Is Hereby Stipulated And Agreed By and between the undersigned counsel as follows:

1. That each of the two copies of the reporter's transcript of the testimony herein about to be filed shall be considered available to and for the use of all parties to this appeal.

2. That the presentation of this appeal to the United States Circuit Court of Appeals for the Sixth Circuit shall be made on a single record on behalf of all appellants.

3. That the following portions of the record on appeal need not be printed as required by Rule 20 (2) of the rules of the United States Circuit Court of Appeals for the Sixth Circuit.

(a) Bill of Complaint with mortgage or deed of trust attached as an exhibit filed on or about April 15, 1931, in

which complaint Chatham-Phenix National Bank and Trust Company and James F. McNamara are plaintiffs and Inland Gas Corporation, et al., are defendants, together [fol. 296] with letters dated April 3, 1931, referred to in paragraph "13th" of said complaint.

(b) Report and supplemental report by Stone & Webster Engineering Corporation, respectively dated November 24, 1934 and December 6, 1935, and filed December 7, 1935, and second supplemental report of Stone & Webster Engineering Corporation dated March 30, 1937 and filed April 1, 1937.

(c) Such other filed papers, documents and records as may be designated by any other party or parties to this appeal as such parties may desire not to be printed but handed up to the Appellate Court and as they may be designated for such purpose by such party or parties.

(d) The Clerk of the Court be authorized by this Court to transmit to the United States Circuit Court of Appeals for the Sixth Circuit such documents, papers or records as may be filed and required upon the argument of the appeal by the designations of the respective parties to said appeal.

(e) An Order to the foregoing effect may be entered by this Court on the application of any party without further notice.

June 8, 1944.

Richard B. Hand, Attorney for the Van Horn Committee for Inland First Mortgage Bonds. Homer W. Bowers, Attorney for Carl Early, et al., Inland Debenture Bondholders. C. J. Odenweller, Jr., Attorney for Securities and Exchange Commission. Clifford E. Smith, Special counsel to Ben Williamson, Jr., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation. Mil- [fol. 297] bank, Tweed & Hope, Attorneys for the Vanston Committee for Inland Gas Corporation and Kentucky Fuel Gas Corporation First Mortgage Bonds. Willkie, Owen, Otis, Farr & Gallagher, Attorneys for the Paul Committee for Inland Gas Corporation and Kentucky Fuel Gas Corporation Debenture Bonds. Stoll, Muir, Townsend,

Park & Mahoney, Attorneys for Clinton M. Harbison, Trustee for American Fuel and Power Company. Cadwalader, Wickersham & Taft, Counsel for Lilienthal Committee for American Fuel and Power Company Notes. Baker, Obermeier, Rosner & Rosenson, Attorneys for Green Committee and Morris Green.

[fol. 296] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtors

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

ORDER

The Green Committee and Morris Green having filed their petition dated July 6, 1944, praying that their time to file the record on appeal from the order and judgment of this Court dated May 13, 1944, be enlarged, and the Court being advised in the premises and having given due consideration thereto, it is hereby

Ordered that the time for the appellants to file the record on appeal from the order and judgment of this Court dated May 13, 1944, be enlarged and extended to August 21, 1944.

H. Church Ford, U. S. D. J.

Dated, Lexington, Kentucky, July 8th, 1944.

[fol. 299] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY, AT LEXINGTON

In Bankruptcy, No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtors

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy, No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

PETITION FOT EXTENSION OF TIME

Now come Louis A. Green and Robert Heilbrunn acting as a committee, known as the Green Committee, in the matter of American Fuel and Power Company, Debtors and Morris Green, a creditor of Inland Gas Corporation, and respectfully petition this Court that the time within which the record on appeal from the order and judgment of this Court dated May 13, 1944 be filed be extended and enlarged from the 20th day of July, 1944 to the 21st day of August, 1944. Petitioners aver that in view of the delay in being able to get the record prepared for printing not sooner than June 28th, 1944, and since Westerfield-Bonte Co., Inc. of Louisville, Kentucky, which is to print the record, has informed petitioners that it could not have the record printed within the time prescribed by the rules, to-wit, on or before July 20, 1944, due to pressure of business resulting from the emergency war conditions, petitioners pray that an order be entered enlarging their time for the filing of the record to August 21, 1944.

Dated, New York, July 6, 1944.

Yours, etc., Baker, Obermeier, Rosner & Rosenson, by Oscar S. Rosner, Attorneys for Green Committee and Morris Green.

[fol. 300] CLERK'S CERTIFICATE

UNITED STATES DISTRICT COURT,
Eastern District of Kentucky, ss:

I, A. B. Rouse, Clerk of the United States District Court for the Eastern District of Kentucky, do certify that the foregoing 299 pages contain a true copy of the original record as per designation filed June 9, 1944, in the cases of the Inland Gas Corporation No. 989, Kentucky Fuel Gas Corporation, No. 991 and American Fuel & Power Co., No. 115, Lexington Docket (with the exception of Items 7, 8, and 9, which were prepared in the office of Ben Williamson, Jr., Trustee, for The Inland Gas Corporation and Kentucky Fuel Gas Corporation), now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Lexington, this 28th day of July, A. D. 1944.

A. B. Rouse, Clerk, U. S. District Court, Eastern District of Kentucky. (Seal.)

[fol. 301] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

No. 9846

W. J. K. VANSTON, FREDERIC J. FULLER and P. ERSKINE WOOD, as Bondholders Protective Committee (and not individually), acting under Deposit Agreement dated December 2, 1932, between said Committee, Holders of Inland Gas Corporation First Mortgage 6½% Sinking Fund Gold Bonds, Series A, Due February 1, 1938, and others, William H. Rice and Victor A. Bradley, Petitioners,

Against

INLAND GAS CORPORATION, Defendant

CREDITORS' PETITION FOR REORGANIZATION OF CORPORATE DEBTOR—Filed October 15, 1935

To The Honorable H. Church Ford, Judge of Said Court:

Your petitioners respectfully show unto your Honor:

1. That Inland Gas Corporation is a corporation organized and existing under the laws of the State of Dela-

ware, and is duly qualified to transact business in the Eastern District of Kentucky.

2. That during the six months next preceding the date of the filing hereof, Inland Gas Corporation has had its business, its principal place of business and its principal assets within the territorial jurisdiction of the Eastern District of Kentucky; that Inland Gas Corporation is engaged in the business of producing and marketing natural [fol. 302] gas in the State of Kentucky, and on information and belief it is not a public utility.

3. That Inland Gas Corporation is not a municipal railroad, insurance or banking corporation, and could become a bankrupt under Section 4 of the Bankruptcy Act.

4. That the assets of Inland Gas Corporation consist principally of leases and leasehold interests for gas purposes, and gas wells, pipe-lines, meters, contracts for the purchase and sale of natural gas, rights of way, materials, supplies and equipment used and useful in the production and sale of said natural gas.

5. That the authorized capital stock of Inland Gas Corporation consists of 500,000 shares of common stock without par value, of which 340,699 shares are now outstanding.

6. That the liabilities of Inland Gas Corporation include $4,254,700 principal amount of First Mortgage 6½% Sinking Fund Gold Bonds Series A, due February 1, 1938, issued under and secured by an Indenture of Mortgage dated February 1, 1928, executed by Inland Gas Corporation to Chatham Phenix National Bank and Trust Company (to which Manufacturers Trust Company has become successor) and James F. McNamara, as Trustees; $1,450,000.00 principal amount of 7% Sinking Fund Debentures due February 1, 1938, issued under the provisions of an Indenture of Trust between Inland Gas Corporation and the New York Trust Company, Trustee, dated February 1, 1928, and $400,000.00 principal amount of 6% Gold Notes due February 1, 1938, issued under the provisions of an Agreement between Inland Gas Corporation and Porter M. Gray, Trustee, dated as of January 2, 1930, which said Debentures and Gold Notes are secured by an Indenture of Mortgage dated January 2, 1930, executed by Inland Gas Corporation to the Ashland National Bank, Trustee;

that on all of the aforesaid liabilities no interest has been paid since December 2, 1930, and in addition to said liabilities there are other liabilities of the Inland Gas Corporation in amounts unknown to your petitioners.

7. That said Inland Gas Corporation is unable to meet its debts as they mature, and by reason of such facts is in [fol. 303] need for relief under Section 77-B of the Bankruptcy Act as amended.

8. That W. E. Lockhart was by order of this Court appointed Receiver of the property of Inland Gas Corporation on December 2, 1930, in an action entitled "J. T. Williams and Miles Gibson, partners doing business under the firm name and style of Williams & Gibson, plaintiffs, against Inland Gas Corporation, defendant, in Equity No. 1341;" that on April 15, 1931, said W. E. Lockhart was appointed Receiver of all the property of Inland Gas Corporation in an action entitled "Chatham Phenix National Bank and Trust Company and James F. McNamara, as Trustee, plaintiffs, against Inland Gas Corporation, W. E. Lockhart, as Receiver of Inland Gas Corporation, The New York Trust Company, as Trustee; Ashland National Bank, as Trustee, defendants, in Equity No. 1353," and that said W. E. Lockhart qualified as Receiver, and is still acting as Receiver, of Inland Gas Corporation, and that both of said proceedings are still pending in this Court undetermined.

9. That your petitioners are creditors of said Inland Gas Corporation, having provable claims against Inland Gas Corporation which amount in the aggregate, in excess of the value of the securities held by them, if any, to more than $1,000; that the nature and amount of your petitioners' claims are as follows:

(1) Petitioners W. J. K. Vanston, Frederic J. Fuller and P. Erskine Wood, as Bondholders Protective Committee (and not individually), acting under Deposit Agreement dated December 2, 1932, are the owners and holders of $2,905,300 principal amount of First Mortgage 6½% Sinking Fund Gold Bonds Series A, due February 1, 1938, of Inland Gas Corporation.

(2) That petitioner William H. Rice is the owner and holder of a $500 First Mortgage 6½% Sinking Fund Gold

Bond Series A, due February 1, 1938, of Inland Gas Corporation.

(3) That petitioner Victor A. Bradley is the owner and holder of two $1,000.00 First Mortgage 6½% Sinking Fund [fol. 304] Gold Bonds Series A, due February 1, 1938, of Inland Gas Corporation.

10. That your petitioners propose that Inland Gas Corporation shall effect a reorganization pursuant to the provisions of Section 77B of the Bankruptcy Act, as amended.

11. That on information and belief, Inland Gas Corporation, has filed no petition or answer under Section 77B of the Bankruptcy Act in this Court or any other Court having jurisdiction thereunder.

Wherefore, your petitioners respectfully pray that this their petition may be approved by this Honorable Court and that proceedings may be had thereon in accordance with the provisions of said Act.

W. J. K. Vanston, Frederic J. Fuller and P. Erskine Wood, as Bondholders Protective Committee (and not individually), acting under Deposit Agreement dated December 2, 1932, between said Committee, Holders of Inland Gas Corporation First Mortgage 6½% Sinking Fund Gold Bonds, Series A, Due February 1, 1938, and others, William H. Rice and Victor A. Bradley, Petitioners, by LeWright Browning, Attorney for Petitioners. Milbank, Tweed, Hope & Webb, Attorneys for W. J. K. Vanston, Frederic J. Fuller and P. Erskine Wood as Bondholders Protective Committee.

[fol. 305] *Duly sworn to by LeWright Browning. Jurat omitted in printing.*

[fol. 306] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

No. 989-B

W. J. K. VANSTON, FREDERIC J. FULLER and P. ERSKINE WOOD, a Bondholders Protective Committee (and not individually), acting under Deposit Agreement dated December 2, 1932, between said Committee, Holders of Inland Gas Corporation First Mortgage 6½% Sinking Fund Gold Bonds, Series A, due February 1, 1938, and others, William H. Rice and Victor A. Bradley, Petitioners,

Against

INLAND GAS CORPORATION, Defendant

ORDER APPROVING CREDITORS' PETITION AND APPOINTING TEMPORARY TRUSTEE—Filed October 26, 1935

The petition of W. J. K. Vanston, Frederic J. Fuller and P. Erskine Wood, as Bondholders Protective Committee (and not individually), acting under Deposit Agreement dated December 2, 1932, between said Committee, Holders of Inland Gas Corporation First Mortgage 6½% Sinking Fund Gold Bonds, Series A, due February 1, 1938, and others, William H. Rice and Victor A. Bradley, having been duly filed herein, and it appearing therefrom that the debtor, Inland Gas Corporation, is a corporation that could become a bankrupt under Section 4 of the Bankruptcy Act, and is unable to meet its debts as they mature, and it further appearing that a copy of said petition, together with writ of subpoena, has been served upon the debtor more than ten days prior to this date, and that the petitioners [fol. 307] propose that said debtor shall effect a reorganization pursuant to the provisions of Section 77B of the Bankruptcy Act, as amended; and the Judge being satisfied that said petition complies with Section 77B of the Bankruptcy Act, and has been filed in good faith; and it further appearing to the Judge upon notice to the debtor, and to W. E. Lockhart, Receiver of Inland Gas Corporation, Manufacturers Trust Company, James F. McNamara, New York Trust Company, Porter M. Gray, and Ashland National Bank, of Ashland, Kentucky, the foregoing being persons to whom the Judge has previously determined that notice

should be given, that a temporary trustee should be appointed, with the powers prescribed by Section 77B of the Bankruptcy Act, it is accordingly now

Ordered that said petition be and it is hereby approved as properly filed under Section 77B of the Bankruptcy Act; it is further ordered that W. E. Lockhart, of Ashland, Kentucky, be and he is hereby appointed temporary trustee of all and singular the assets and estate of the debtor (except as hereinafter specifically set out), upon executing and filing with the Clerk of this Court a bond in the sum of Seventy five Thousand Dollars ($75,000.00), with good and sufficient sureties, to be approved by the Court, and conditioned to be void if he shall well and truly perform the duties of his office, and duly and faithfully account to whom it may concern for all moneys, properties and things whatsoever that may come into his hands by virtue of his office, and otherwise perform all things soever that he shall be directed by the Court or Judge to do; and said trustee, upon so executing and filing said bond, shall be vested with all the powers of a receiver in equity, not inconsistent with the provisions of Section 77B of the Bankruptcy Act, but subject always to the direction and control of the Court; and it is further

Ordered that the trustee so appointed shall within ten (10) days after the entry of this order, cause a notice to be mailed to each of the known creditors of the debtor, at his last known postoffice address, to Manufacturers Trust Company and James F. McNamara, Trustees under that certain indenture of mortgage, dated February 1, 1928, exe- [fol. 308] cuted by the debtor; to New York Trust Company, Trustee under that certain indenture of mortgage dated February 1, 1928, executed by the debtor; and to Ashland National Bank, Trustee under that certain indenture of mortgage, dated January 2, 1930, executed by debtor; and to all stockholders of the debtor, as the same may appear upon the books of the debtor; and to cause publication of such notice to be made at least once a week for two successive weeks in a newspaper published and having a general circulation in the City of Ashland, Kentucky, and the City of New York, New York, that a hearing will be held herein before the Judge at the courtroom in the City of Lexington, Kentucky, on the 23rd day of Nov. 1935, at 10 o'clock, A. M. to determine whether such appointment of

said temporary trustee shall be made permanent, or shall be terminated and the debtor, or its receiver in equity restored to possession; or whether such trustee shall be removed and the debtor or its receiver in equity continue in possession; or whether a substitute trustee or trustees shall be appointed by the Judge; and it is further

Ordered that the trustee appointed herein be and he is hereby authorized and directed pending further order herein, to conduct, manage, maintain and keep in proper conditions and repair the assets, properties and business of the debtor, wherever situated; and to employ and discharge, and to fix the compensation of all officers, agents, managers, superintendents, and employes; to collect and receive all income, rents, revenues, tolls, issues and profits of said properties and business; and to collect all outstanding accounts, and all dividends and interest securities belonging to it; and it is further

Ordered that the said Trustee be and he is hereby authorized in his discretion, from time to time, until further order herein, out of funds now or hereafter coming into his hands to pay:

(a) All necessary current expenses of the debtor in operating the assets and properties and conducting the business of the debtor, including among other expenses, the wages, salaries and compensation of all officers, attorneys, [fol. 309] counsel, managers, superintendents, agents or employes retained by the receiver in equity of the debtor;

(b) The expense of maintaining the corporate existence of the debtor, including the necessary expenses of the preservation of the records, and the registration and transfer of its stocks and bonds and trustee's charges under indentures under which securities of the debtor have been issued;

(c) The expenses of printing pleadings, motions petitions and orders now on file or hereafter filed in this case, which are reasonably necessary to be printed, and in such quantities as shall provide copies for the use of the Court and Judge and such others as may have substantial interest herein; such expenses to be taxed as costs in the case; and it is further

Ordered that said trustee shall, on or before the 23rd day of November, 1935, unless the time be extended by order, report to the Judge as to the advisability of reject-

ing or rescinding any contract of the debtor, executory in whole or in part as to the continuance of operation by the trustee under any of said contracts; and it is further

Ordered that not later than the 23rd day of November 1935, the Trustee shall file with the Clerk of this Court a statement of the assets and liabilities of the debtor as of the 1st day of October, 1935; and it is further

Ordered that pending further order of this Court in the premises, the said Trustee is hereby authorized and empowered to institute or prosecute in any court or before any tribunal of competent jurisdiction all such suits or proceedings as may be necessary in his judgment for the recovery or proper protection of the properties or rights of the debtor, and to make settlement of any thereof; and likewise to defend any actions, claims, proceedings or suits now pending against the debtor, or its receiver in equity, or which may hereafter be brought in any court, or before any officer, department, commissioner or tribunal, to which the trustee, or debtor, or its receiver in equity are or shall be a party; and it is further

Ordered that all persons, firms and corporations having in their possession any of the property of the debtor shall [fol. 310] forthwith deliver the same to the trustee, and shall make such transfers, assignments and conveyances in connection therewith as may be necessary and proper; and that each and every of the officers, directors, agents and employers of the debtor shall forthwith turn over and deliver to said trustee, or his duly constituted representative, all books of accounts, vouchers, papers, deeds, contracts, notes, securities, accounts, moneys or other properties in his or their hands or under his or their control, belonging to or in the possession of the debtor, and otherwise abide by and conform to such orders not inconsistent with the provisions of Section 77B of the Bankruptcy Act, as may be given from time to time by said trustee or his duly constituted representative, in connection with the business of the debtor, and in the discharge of his duties as trustee; and it is further

Ordered that the debtor, its stockholders, directors, officers, agents, attorneys, servants and employes, and all other persons, including sheriffs or marshals, whether creditors or claiming to be creditors, whether having or claiming to have any right, title or interest in or to any

property or properties of the debtor, be and they hereby are enjoined and restrained from interfering with, attaching, garnisheeing, levying upon, or enforcing liens upon, taking possession of, removing, disposing of, or in any manner whatsoever disturbing any portion of the assets, goods, monies, properties and premises belonging to, or in the possession of, the debtor or its receiver in equity, or the said trustee herein, and from instituting or prosecuting or continuing the prosecution of any action at law or action or proceeding in equity or bankruptcy against the debtor, or its receiver in equity, or the trustee, in any court of law or equity or bankruptcy, or before any association, commission, board, referee or other court or tribunal; and from interfering in any other manner, to prevent the discharge by the trustee of his duties and obligations in the maintenance and operation of such business under the orders of this court. Provided, however, that the court or Judge may upon notice, and for cause shown, permit to be instituted or maintained any judicial proceeding to enforce [fol. 311] any lien upon the estate of debtor that may be appropriate; and it is further

Ordered that the trustee shall close the present books of account of the debtor and of its receiver in equity, as of the 31st day of October, 1935, and shall open new books of account as of said date, and shall cause to be kept in said new books of account due and proper accounts of their earning, expenses, receipts and disbursements as such trustee, and shall preserve proper vouchers for all payments made on account thereof, and shall deposit the moneys coming into his hands in any bank in which funds of the debtor, or its receiver in equity, were being deposited at the time of the filing of the petition herein; and it is finally

Ordered that full right and jurisdiction is reserved to make from time to time such orders as the Court or Judge shall deem proper; among others, orders fixing the time within which any plan of reorganization shall be proposed, accepted and confirmed; orders requiring the debtor or the trustee to file such schedule and submit such information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan of reorganization; orders fixing the time within which claims and interests of creditors and stockholders may be filed or evi-

denced, and after which no such claim or interest may participate in any plan except on order for cause shown; orders fixing the manner in which claims and interests may be filed or evidenced and allowed; and, for the purpose of any proposed plan of reorganization and its acceptance; orders dividing creditors and stockholders into classes according to the nature of their respective claims and interests, and in general all such orders amplifying, extending, limiting or otherwise modifying this order as may at any time be deemed proper.

And it further appearing that in that certain cause now pending in the District Court of the United States for the Eastern District of Kentucky, In Equity No. 1353, wherein Manufacturers Trust Company and James F. McNamara, as Trustee are plaintiffs, and Inland Gas Corporation, et al., defendants, the said W. E. Lockhart was appointed [fol. 312] receiver of the debtor herein, Inland Gas Corporation, and thereafter duly qualified as such, and that he has been acting as such receiver since said appointment, pursuant to the orders of the Court entered in said proceeding, it is now

Ordered that nothing herein contained shall effect, prejudice or alter the power of the Court in said cause to fix allowances therein to those entitled thereto, and the Trustee herein is directed to pay allowances so made.

Dated 26th day of October, 1935.

H. Church Ford, United States Judge.

[fol. 313] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

W. J. K. VANSTON, FREDERIC J. FULLER AND P. ERSKINE WOOD, a Bondholders Protective Committee (and not individually), acting under Deposit Agreement dated December 2, 1932, between said Committee, Holders of Inland Gas Corporation First Mortgage 6½% Sinking Fund Gold Bonds, Series A, due February 1, 1938, and others, William H. Rice and Victor A. Bradley, Petitioners,

against

INLAND GAS CORPORATION, Defendant

ORDER MAKING PERMANENT THE APPOINTMENT OF TEMPORARY TRUSTEE—Filed November 23, 1935

The Court having heretofore, to-wit, on the 26th day of October, 1935, duly made an order appointing W. E. Lockhart, of Ashland, Kentucky, as temporary trustee of the estate of the above named debtor, and having in said order directed said temporary trustee to cause notice to be given by publication and mail to creditors and stockholders of a hearing to be held on the 23rd day of November, 1935, at which hearing it should be determined whether the said appointment should be made permanent, or should terminate and the debtor be restored to the possession of its property, or a substitute trustee or trustees, or additional trustee or trustees, be appointed; and due proof having been filed herein of the giving of such notice, in accordance with the provisions of said order, and the matter of said trusteeship having been duly considered by the Court, at [fol. 314] the time and place specified in said order and notice, and the Court being advised, it is now

Ordered that the said appointment of said W. E. Lockhart, of Ashland, Kentucky, as temporary trustee of the estate of the Inland Gas Corporation, debtor herein, be and it hereby is made permanent, and the said W. E. Lockhart, as such permanent trustee, shall continue to have and be vested with all the rights, powers, authority and title possessed by him as temporary trustee herein; and that the bond heretofore filed herein by said W. E. Lockhart as temporary trustee, pursuant to the order of the Court, shall be continued as the bond of said permanent trustee,

and no other or further bond shall be required. It is further

Ordered that the time within which the said trustee shall report as to the advisability of rejecting or rescinding any contract of the debtor, executory in whole or in part, and as to the continuance of operation by the trustee under any of said contracts, is extended to and including the 10th day of January, 1936. It is further

Ordered that on or before the 5th day of December, 1935, said trustee shall prepare and file the schedule of assets, lists of creditors and stockholders, and other information required by Section 77B of the Bankruptcy Act to be filed, for the purpose of disclosing the conduct of the debtor's affairs and the fairness of any proposed plan of reorganization. It is further

Ordered, that the 10 day of Jany., 1936, be and it is hereby fixed as the reasonable time within which the claims and interests of creditors and stockholders may be filed or evidenced, and after which any such claim or interest may not participate in any plan of corporate reorganization herein, except on order for cause shown. And it is further

Ordered that it shall be sufficient form and manner of evidencing the claims of creditors that they follow in general the official forms prescribed by the Supreme Court for bankruptcy, with the word "debtor" substituted for the word "bankrupt" therein, and that they comply with the requirements for proofs of debt in bankruptcy prescribed in Section 57 of the Bankruptcy Act, and in the [fol. 315] Supreme Court's General Order 21, save and except that in addition to those designated therein as proper persons to make oath to depositions for proof of debt, any agent or committee of an individual, partnership, or corporation creditor, whose general duties authorize him to make such claims, or who is specially authorized thereto, may make such oath; and save and except further that failure to comply with the requirements that are non-essential in the particular case may in the interests of justice be disregarded; and it is further

Ordered that the interests of stockholders shall be presented by the filing of a statement thereof in writing under oath of said stockholder, or by his agent generally or specially authorized thereto, setting forth the essential facts of such interest, and said interest shall be evidenced by the books of the debtor corporation, and by such further or

corrective proof by affidavit or otherwise as may be deemed necessary. It is further

Ordered that the trustee shall give notice of the time within which the claims and interests of creditors and stockholders may be filed or evidenced as herein provided for, by publication once a week for two successive weeks in a newspaper published and having a general circulation in the City of Ashland, Kentucky, and in a newspaper published and having a general circulation in the City of New York, New York, and by mailing written notices thereof to each of the creditors and stockholders of the debtor, as their names appear in the lists of creditors and stockholders ordered to be filed herein. It is further

Ordered that this order is without prejudice to the right of any interested party to petition the Court for removal of this proceeding to any other Court of competent jurisdiction. It is further

Ordered that this cause hereafter shall proceed under the following style and manner, to-wit, "In the Matter of Inland Gas Corporation, Debtor, No. 989."

Dated at Lexington, Kentucky, this 23rd day of Nov. 1935.

H. Church Ford, United States District Judge.

[fol. 316] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

ORDER—Filed June 26, 1937

W. E. Lockhart, having tendered his resignation as Trustee herein, to be effective July 1, 1937, it is now ordered, considered and adjudged that his services as Trustee, and drawing account, be terminated as of that date.

It is further ordered that Ben Williamson, Jr., whose appointment as Co-Trustee has heretofore been made permanent by orders of this Court, shall, from and after July 1, 1937, become sole trustee of the Inland Gas Corporation and shall have the full and sole authority conferred upon or granted to the Trustee by orders entered herein on

November 1, 1935, and November 23, 1935, and any subsequent order of this Court.

It is further ordered that the bond heretofore filed herein by said Ben Williamson, Jr., as temporary Co-Trustee, and continued as permanent Co-Trustee, shall be continued as the bond of said Ben Williamson, Jr., as Trustee, the said Ben Williamson, Jr., and the surety, Fidelity & Deposit Company of Maryland, having filed herein their written consent to such continuance and extension of the aforesaid bond.

The said Ben Williamson, Jr., as Trustee, is further authorized and ordered to procure an audit of the receipts and disbursements of the said W. E. Lockhart, Trustee, from the date of his appointment, November 1, 1935, to and including the date of the appointment of the Co-Trustee, May 6, 1937, and an audit of receipts and disbursements of W. E. Lockhart and Ben Williamson, Jr., Co-Trustees, from May 6, 1937, to June 30, 1937, and to file the reports of such audits herein. Final discharge of W. E. Lockhart, as Trustee, and all other matters incident thereto are reserved pending the further orders of the Court.

H. Church Ford, Judge.

[fol. 317] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

APPLICATION FOR DISTRIBUTION—Filed November 3, 1943

To the Honorable H. Church Ford, Judge of the District Court of the United States for the Eastern District of Kentucky:

The Petition of Russell Van Horn, Wendell E. Warren and Edward Austin Waters, Constituting a Committee for the Protection of the Holders of First Mortgage 6½% Sinking Fund Gold Bonds, Series "A" Dated February 1, 1928, due February 1, 1938, of Inland Gas Corporation respectfully shows:

First: That Ben Williamson, Jr., [illegible] above named Debtor, had on hand as of June [illegible] following securities:

United States Postal Savings Certificates	$2,100,000.00
Accrued Interest on United States Postal Savings Certificates	58,625.00
United States Savings Bonds, Series F	199,948.00
	$2,358,573.00
and in addition thereto had cash in bank and on hand amounting to	274,524.09
	$2,633,097.09

Second: That said item of cash on hand is amply sufficient at this time for the Debtor's working capital.

[fol. 318] Third: That the First Mortgage Bondholders of Inland have a first lien on all of such U. S. Postal Certificates and U. S. Savings Bonds, and on any liquidation or distribution of assets are entitled to receive the proceeds realizable from all of said items.

Fourth: That the First Mortgage Bondholders of the above named Debtors represented by your petitioners are desirous of having a partial distribution at this time at the rate of $500 on account of the amount due on each $1,000.

First Mortgage Bond of Inland; your petitioners are informed that other First Mortgage Bondholders not represented by petitioners are likewise desirous of having such a partial distribution.

Fifth: That so far as your petitioners know, no reason exists why such distribution should not be made at this time.

Sixth: Annexed hereto is a copy of the balance sheet of Ben Williamson, Jr., Trustee of the Debtor herein, as of June 30, 1943. Subsequent to the date of said balance sheet, the liabilities shown thereon were subsequently reduced in that by judgment of this Court the claim of Columbia Gas & Electric Corporation, based on $1,596,600 face amount of First Mortgage Bonds of the Debtor, and on $320,100 debentures and on account of advances aggregating $252,315.21, with interest on each of said items, were rejected. Your petitioners do not know of any other substantial changes in said balance sheet since the date thereof.

Wherefore your petitioners pray that an order be entered herein—

(1) Fixing a date for hearing on this petition.

(2) Directing Ben Williamson, Jr., as Trustee herein, to give notice of such hearing to such persons in interest as the Court may direct, such notice to require that any persons who intend to object to the partial distribution prayed for herein file a statement of such objections not less than ten days before the date fixed for hearing on this petition.

(3) If on such hearing the Court find that such partial distribution may properly be made, then, for an order directing the Trustee herein to make the same.

[fol. 319]

Dated: October 7, 1943.

Russell Van Horn, Wendell E. Warner and Edward Austin Waters, Constituting a Committee for the Protection of Holders of First Mortgage 6½% bonds, etc., of Inland Gas Corporation. By Russell Van Horn, Chairman.

Duly sworn to by Russell Van Horn; jurat omitted in printing.

[fol. 320] Ben Williamson, Jr., Trustee Inland Gas Corporation (Combining Accounts of Corporation and Trustee)

Balance Sheet as of June 30, 1943

Assets

Fixed Capital:		
Gas Plant		$5,983,216.48
Miscellaneous Intangible Capital		850,437.00
		$6,833,653.48
Current and Working Assets of Trustee:		
Cash in Bank and on hand	$274,524.09	
United States Postal Savings Certificates	2,100,000.00	
Accrued Interest on United States Postal Savings Certificates	58,625.00	
United States Savings Bonds, Series F	199,948.00	2,633,097.09
Accounts Receivable—Customers	$72,241.34	
Accounts Receivable—Associated Companies	30,592.57	
Accounts Receivable, Other	9,847.04	
Advances to and Amounts due from Employees	204.97	
Prepayments	10,661.26	
		123,547.18
Material and Supplies		84,799.59
Total Current Assets		2,841.443.86
Investments in and Due From Associated Companies in Bankruptcy:		
Investments	$38,500.00	
Accounts Receivable	33,667.58	
Prepaid Gas Purchase	1,500.00	
		73,667.58
Deferred Charges		1,592.97
Total Assets		$9,750,357.89

[fol. 321] **Liabilities:**

Capital Stock		2,126,587.00
Funded Debt:		
First Mortgage	$4,254,700.00	
Less: Distribution 25% of Principal	1,063,675.00	
	$3,191,025.00	
Second Mortgage	1,850,000.00	5,041,025.00
Current and Accrued Liabilities of Trustee:		
Accounts Payable	$14,264.39	
Accounts Payable—Associated Companies	19,820.18	
Customers' Service Deposits	242.75	
Accrued Taxes (Estimated)	26,474.66	
Other Current and Accrued Liabilities	7,160.98	67,962.94
Accrued Interest on Funded Debt:		
First Mortgage	$3,322,507.07	
Second Mortgage	1,635,041.59	4,957,548.66
Claims of Unsecured Creditors Prior to Receivership and Accrued Interest		1,192,217.42
Reserves for Depreciation, Depletion and Amortization		3,015,387.01
Contribution in Aid of Construction		4,216.31
Surplus—Earned		6,654,586.38
Total Liabilities		$9,750,357.89

Note: Liabilities do not include claim of Carbreath Gas Company in connection with contract for purchase of natural gas.

[fol. 322] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY, LEXINGTON

No. 989

In the Matter of INLAND GAS CORPORATION, Debtor

ORDER—Entered and Filed November 3, 1943

The day came W. E. Darragh, counsel for Russell Van Horn, Wendell E. Warner and Edward Austin Waters, Constituting a Committee for the Protection of Holders of First Mortgage 6½% Bonds, etc., of Inland Gas Corporation, and offered for filing—

> Motion asking for distribution of funds held by the Trustee in the above styled case, fixing a date for the hearing of the motion, and directing Ben Williamson, Jr., Trustee, to give notice of hearing to such persons of interest as the Court may direct and such notice to require any persons who intend to object to the distribution prayed for to file a statement of objection not less than ten (10) days before the date fixed for hearing on the motion.

and the Court being advised, it is

Ordered that the Motion be, and it is now filed and noted of record.

H. Church Ford, Judge U. S. District Court.

[fol. 323] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtors

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

RESPONSE OF BEN WILLIAMSON, JR., TRUSTEE OF INLAND GAS CORPORATION, TO APPLICATION FOR DISTRIBUTION, AND PETITION FOR ADVICE—Filed November 13, 1943

To the Honorable H. Church Ford, Judge of the District Court of the United States for the Eastern District of Kentucky:

I

Ben Williamson, Jr., Trustee of the Inland Gas Corporation, for his response to the Application for Distribution filed herein by the VanHorn Committee, states:

1. The Trustee is advised that many of the holders of the Inland Gas Corporation's First Mortgage Bonds desire that a distribution be made in accordance with the Application filed by the Vanhorn Committee.

2. If such distribution safely and properly may be made, the Trustee favors the Distribution, in order

(a) To save further accumulation of interest, and

[fol. 324] (b) To be relieved of the responsibility of holding a large amount of cash and securities now held by the Trustee which would have to be applied in making the distribution.

II

Ben Williamson, Jr., as Trustee of the Inland Gas Corporation, for his petition herein states that during the pendency of this proceeding, numerous questions have

been raised by various interested parties, and that he believes said questions should be determined before the application filed by the VanHorn Committee, is approved or authorized.

He states that he deems the following questions to be pertinent; and that said questions should be fully presented and finally determined, to-wit:

1. Are the First Mortgage Bondholders entitled to interest, on interest as provided in the Trust Indenture securing the First Mortgage Bonds?

2. Does the judgment of the District Court cancelling the claims of the Columbia Gas and Electric Corporation as holder of the First Mortgage Bonds and Debentures result in taxable income within the scope, intent, and meaning of the Federal Income Tax Laws? The indebtedness evidenced by said Bonds and Debentures having been valid, subsisting indebtedness of the Inland Gas Company at the time the Bonds and Debentures were issued, the judgment in effect cancelling that indebtedness evidenced by the Bonds and Debentures held by the Columbia Gas and Electric Corporation, and in effect discharging that portion of the Company's liability evidenced by the Bonds and Debentures held by the Columbia Gas and Electric Corporation without the Inland Gas Corporation paying out any cash in discharge of the obligation, is the basis of the question.

3. Since admittedly all of the outstanding First Mortgage Bonds and the Debentures were valid when issued, and each bondholder and debenture holder had as security for the payment of his bond or bonds and debenture or debentures his aliquot equity in the mortgaged property, and the subsequent acts of Columbia in acquiring bonds and [fol. 325] debentures which it acquired having resulted in a judgment declaring Columbia's bonds and debentures unenforceable, some of the debenture holders and general creditors have contended and may now contend that they should in effect be subrogated to the rights which Columbia Gas and Electric Company would have had as the owner of the bonds and debentures but for its violation of the Anti-Trust Laws, which resulted in the judgment aforesaid; and that the judgment holding Columbia Gas and Electric Company's claims unenforceable should not and cannot

operate to increase the equity of the First Mortgage Bondholders. If the judgment of the Court denying Columbia Gas and Electric Company any recovery on its bonds, debentures, and claims be treated as damages or as a penalty in the nature of damages, the contention of the debenture holders and the general claimants may be correct; and this question should be determined before the Application for Distribution is approved or authorized.

4. The Trustee is informed and believes that many of the present owners and holders of the First Mortgage Bonds and Debentures issued by Inland Gas Corporation purchased such Bonds and Debentures

(a) Subsequent to the receivership of the Inland Gas Corporation; and

(b) Subsequent to the institution of this proceeding in bankruptcy.

The Trustee is further informed and believes that many of the present owners and holders of said First Mortgage Bonds and of said Debentures purchased the same at substantially less than the face amount of said Bonds and Debentures. It has been contended by some of the holders of the Bonds and Debentures, and may now be contended, that before any further distribution is made to the First Mortgage Bondholders, the holders of each of said Bonds should be required to prove when each Bond was acquired, the amount paid therefor; and that the Court should determine that it is not consistent with public policy that such holders should be allowed to participate in the distribution on the basis of full face value; and that the Court should [fol. 326] limit any claims acquired by such person in contemplation of or in the course of the proceedings under this Chapter to the actual consideration paid therefor by the holder.

The Trustee regards this question as pertinent and believes that it should be determined before the aforesaid Application for Distribution is approved or authorized.

5. Another question which has been raised and which the Trustee thinks should be determined is whether or not the net earnings from the sale of gas should be applied in full to the payment of the First Mortgage Bonds until these Bonds are paid in full; or whether or not the de-

bentvre holders and general creditors may have some interest in or claim to the participation of their claims in the distribution of such net earnings.

6. The Court should give due consideration to the probable effect the distribution applied for would have on the chance of ultimately working out of a sound and acceptable reorganization plan.

Ben Williamson, Jr., as Trustee of the Inland Gas Corporation, believes that the foregoing questions should be fully considered and determined; that the respective parties in interest should be required to present, by appropriate pleadings, the aforesaid and any other claims or questions respecting their respective rights and interests; and that the foregoing and any other pertinent questions should be heard and fully determined before the Application for Distribution filed by the VanHorn Committee is approved or authorized.

Wherefore, Ben Williamson, Jr., as Trustee of the Inland Gas Corporation, prays that an order be entered herein:

1. Fixing the date for hearing on this petition;

2. Directing that all interested parties, on or before a date specified, should file appropriate pleadings asserting their respective claims, if any, with respect to the questions stated in the foregoing petition and any other claims which may be pertinent.

3. That an appropriate order be entered herein determining each of the questions presented in the foregoing [fol. 827] petition and determining the Trustee's rights and duties with respect thereto.

(S.) Clifford E. Smith, Attorney for Ben Williamson, Jr., as Trustee for the Inland Gas Corporation, and the Kentucky Fuel Gas Corporation.

Duly sworn to by Ben Williamson, Jr. Jurat omitted in printing.

[fol. 328] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtors

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

ORDER—Filed December 3, 1943

These causes comi- on to be heard upon the petition of the VanHorn Co tee Filed on November 3, 1943, for distribution, and up the Response of Ben Williamson, Jr., Trustee of Inland Gas Corporation, to Application for Distribution, and Petition for Advice filed on November 13, 1943, and the Court having considered said petitions and the arguments and suggestions of counsel for respective parties in interest, it is now ordered by the Court as follows, to-wit:

1. That all parties in interest who desire to file briefs on any of the questions presented in the Trustee's Response and Petition for Advice shall file such briefs within thirty (30) days from date hereof;

2. All parties in interest who desire to object to the distribution applied for in the VanHorn Committee's application or who desire to object to any further distribution to First Mortgage Bondholders, or who desire to raise any relevant questions in addition to or supplementing those presented in the Trustee's Response and Petition shall file appropriate pleadings and briefs in support thereof within thirty (30) days from date hereof;

[fol. 329] 3. All parties in interest desiring to respond to briefs directed to be filed in Paragraphs 1 and 2 hereof and all parties in interest desiring to respond to any additional questions raised pursuant to Paragraph 2 hereof shall so respond and file briefs in response within sixty (60) days from date hereof.

H. Church Ford, Judge.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtor

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

ORDER—Entered and Filed February 21, 1944

On December 3rd, 1943, an order was entered in the above captioned causes, directing as follows:

1. That all parties in interest who desired to file briefs on any of the questions presented in the Trustee's response to the petition for distribution of the VanHorn Committee filed on November 3, 1943, and the petition for advice filed [fol. 330] by the Trustee, should file such briefs within thirty days after December 3, 1943.

2. That all parties in interest who desired to object to the distribution applied for in the VanHorn Committee's application or who desired to object to any further distribution to First Mortgage Bondholders or who desired to raise any relevant questions in addition to or supplementing those presented in the Trustee's response and petition, should file appropriate pleadings and briefs in support thereof within thirty days from December 3, 1943.

3. That all parties in interest who desired to respond to any briefs directed to be filed by said order and all parties in interest who desired to respond to any additional questions raised pursuant to the directions of said order should so respond and file briefs within sixty days from December 3rd, 1943.

It is now ordered by the Court that a hearing on all of the aforesaid questions hereby is set beginning on Tuesday, April 11, 1944, at 10:00 A. M. Prior to this hearing, the Trustee of the Inland Gas Corporation and the Kentucky Fuel Gas Corporation will file his report and classi-

fication of claims against said debtor corporations; and at said hearing the Court will consider any objections to the Trustee's report and will determine the classification of said claims.

The Clerk of this Court hereby is directed to send an attested copy of this order to the parties in interest or their attorneys.

H. Church Ford, Judge.

Copy Attest: —— ——, Clerk.

[fol. 331] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

TRUSTEE'S REPORT OF PROOF OF CLAIMS FILED—Filed January 31, 1936

Comes W. E. Lockhart, Trustee herein, and pursuant to the order of the Court, respectfully reports that Proofs of Claims against the Inland Gas Corporation have been filed herein as follows:

Proofs of Claim in Which Liens Are Asserted

First Mortgage 6½% Sinking Fund Gold Bonds, Series A, Dated February 1, 1928, Due February 1, 1938, Issued under Mortgage or Deed of Trust of Inland Gas Corporation Dated February 1, 1928 to Chatham Phenix National Bank and Trust Company and James F. McNamara, Trustees

Manufacturers Trust Company (succeeding Chatham Phenix National Bank and Trust Company) and James F. McNamara, Trustees:

Principal Amount of all Bonds Outstanding	$4,254,700.00
Interest to January 1, 1936	1,737,690.66
Total	$5,992,390.66

Also interest at the rate of 6½% per annum upon the principal and the unpaid interest from January 1, 1936, to date of payment.

"That this claim is made without prejudice to any lien or claim which the Trustees may have under the terms of [fol. 332] the aforesaid Indenture or Mortgage for their expenses, including compensation, incurred in and about the administration of the trust created by the aforesaid Indenture, either against the assets of the company subject to the lien of the mortgage as aforesaid, or otherwise, all of which expenses are made an additional charge upon the assets of the company subject to said lien by the terms of said Mortgage or Deed of Trust."

"That the amount claimed hereby is subject to being reduced by the aggregate amount which shall be finally allowed in the proceedings herein on claims filed and proved herein by the holders of any of the First Mortgage 6½% Sinking Fund Gold Bonds Series A of the debtor, and coupons appertaining thereto, either directly or through some Committee, agent or attorney on account of the principal and/or interest due thereon."

Other Proof-of-Claim Filed Which Are Included in the Trustee's Proof-of-Claim

W. J. K. Vanston, Frederic J. Fuller and P. Erskine Wood as the Committee under the Deposit Agreement, Dated December 3, 1930:

Principal Amount of Bonds Deposited		$2,905,300.00
Interest to October 15, 1935		1,144,806.34
Total		$4,050,106.34
William Bianchi, New York, N. Y.	$6,000.00	
Bruceton Bank, Bruceton Mills, W. Va.	6,000.00	
George B. Harris, Trustee, Suffolk, Mass.	5,000.00	
Smicksburg State Bank, Indiana, Pa.	4,000.00	
	$21,000.00	
* Wm. H. Flowers, Atlanta, Ga.	5,000.00	
* R. C. Spears, Lexington, Ky.	3,000.00	
	$8,000.00	$29,000.00

* Filed subsequent to January 10, 1936.

[fol. 333] Columbia Gas & Electric Corporation, 61 Broadway, New York, N. Y.:

$10,374.98	with interest thereon from the first day of October, 1930, until paid.
164,440.60	with interest thereon from the first day of November, 1930, until paid.
41,118.34	with interest thereon from the first day of December, 1930, until paid.
28,528.02	with interest thereon from the first day of January, 1931, until paid.
7,882.52	with interest thereon from the first day of February, 1931, until paid.
$252,344.46	

Interest is claimed at rate of 6½% per annum.

A lien superior to lien of First Mortgage Bonds is asserted under provisions of Section 16 of Article 5 of Mortgage or Deed of Trust of Inland Gas Corporation, dated February 1, 1928, to Chatham Phenix National Bank and Trust Company and James F. McNamara, Trustees.

Note: The 7% Debentures and 6% Notes hereinafter set out are secured pari passu by Mortgage or Deed of Trust of Inland Gas Corporation dated January 2, 1930 to Ashland National Bank, Trustee, such Mortgage being subordinated to Mortgage or Deed of Trust of Inland Gas Corporation dated February 1, 1928 to Chatham Phenix National Bank and Trust Company and James F. McNamara, Trustees.

6% Gold Notes, Dated January 2, 1930, Due February 1, 1938, Issued under Indenture of Trust of Inland Gas Corporation, Dated January 2, 1930, to Porter M. Gray, Trustee:

William H. Heald, Trustee of American Fuel and Power Company, 300 Equitable Building, Wilmington, Delaware:

Total Principal Amount issued and outstanding	$400,000.00
Interest at 6% from January 2, 1930, to date of payment is also claimed. . . .	

[fol. 334] Ten Year 7% Sinking Fund Gold Debentures, Dated February 1, 1928, Due February 1, 1938, Issued under Indenture of Trust of Inland Gas Corporation,

Dated February 1, 1928, to the New York Trust Company, Trustee:

The New York Trust Company, Trustee:

Principal amount of all Debentures Outstanding	$1,450,000.00
Interest to October 15, 1935	594,733.55
Totaf	$2,044,733.55

"That this claim is made without prejudice to any lien or claim, or priority of treatment with respect to any such lien or claim which The New York Trust Company may have as Trustee under the Indenture, or under an order of this Court, in this cause respecting the filing of claims, etc., dated December 10, 1935, for any compensation for services rendered by it in the execution of the trust created thereby or for reimbursement for any liability and expenses, including counsel fees, incurred under the Indenture, as well as any other claim which The New York Trust Company may have against said Debtor, other than as Trustee of the Indenture or other than as aforesaid."

Other Proofs of Claim Filed Which Are Included in the Trustee's Proof-of-Claim

Robert C. Adams, William P. Phillips and Clyde L. Paul, as the Committee under the Deposit Agreement Dated as of December 9, 1930:

Principal Amount of Debentures Deposited	$1,005,200.00
Interest to October 15, 1935	391,575.38
	$1,396,775.38

[fol. 335] Jacqueline K. Jones, Scituate, Mass.

Principal	$1,000.00	
Interest	350.00	
		$1,350.00

Wm. B. James, Guardian, Scituate, Mass.

Principal	$1,000.00	
Interest	350.00	
		$1,350.00

Smith, Camp & Riley, San Francisco, Cal.	$1,000.00
Ella G. and Clarence E. Tupper, Worchester, Mass.	$5,000.00
*Duane B. Williams, Worchester, Mass.	$1,000.00
	$9,700.00

* Filed subsequent to January 10, 1936.

Summary of Proofs of Claim in Which Liens Are Asserted

First Mortgage Bonds		$5,992,390.66
Columbia Gas and Electric Corporation		252,344.46
		$6,244,735.12
Second Mortgage:		
Debentures	$2,044,733.55	
6% Notes	400,000.00	
		2,444,733.55
		$8,689,468.67

The foregoing claims are filed with the Trustee.

The Piney Oil and Gas Company has filed its Intervening Petition herein, in which the recovery of $1,465,593.20, alleged to be due for untaken gas under a gas sales contract therein set out, is sought and for which a lien is also asserted.

The Trustees of the Hamilton Gas Company have filed their Intervening Petition herein, in which the recovery of [fol. 336] $3,047,574.74, alleged to be due for untaken gas

under a gas sales contract therein set out, is sought and for which a lien is also asserted.

Unsecured Claims

The New York Trust Company, New York, N. Y.: Fee for services as Trustee under Indenture of Trust dated February 1, 1938 (Debentures) counsel fees and other necessary expenses as Trustee)		$5,879.48
Acme Fishing Tool Company, Parkersburg, W. Va.:		
Account	$125.00	
Interest from September 17, 1929, to December 17, 1935	45.63	
		170.63
The Cooper-Bessemer Corporation, Mount Vernon, Ohio		2,483.37
Ditto, Incorporated, Chicago, Illinois		6.63
The Foxboro Company, Foxboro, Mass.		136.40
Frick-Reid Supply Corporation, Pittsburgh, Pa.		34.43
The Illinois National Supply Company, Pittsburgh, Pa.		112.97
Oil Well Supply Company, Oil City, Pa.:		
Account	$43.68	
Interest at 6% from January 15, 1931 to November 30, 1935	11.80	
		55.48
Parkersburg Rig and Reel Company, Parkersburg, W. Va.		90.49
Prestonsburg Wholesale Grocery, Prestonsburg, Ky.:		
Account	38.52	
Interest at 6% from January 1, 1931, to January 1, 1936	11.55	
		50.07

[fol. 337] Standard Accident Insurance Company, Detroit, Michigan:

Account	$4,052.56	
Interest at 6% from February 25, 1931, to January 10, 1936	1,185.21	
		$5,237.77
George W. Sexton, Ashland, Kentucky		32.60
Ernest L. Rueter, 39 Clyde Street, Brookline, Mass.		19.50
William H. Heald, Trustee of American Fuel and Power Company, 300 Equitable Building, Wilmington, Delaware:		
Note	$15,000.00	
Plus interest at 6% from November 29, 1930.		
Loans, Advances, etc.	418,015.51	
Plus interest at 6% from December 2, 1930		$433,015.51
Carbreath Gas Company, 1109 Second National Bank Building, Ashland, Kentucky.		
Loss and damages through failure to take and pay for natural gas under contract October 12, 1927 during following periods:		
July 1, 1929 to December 31, 1929	$107,125.59	
Plus interest at 6% from December 31, 1929		
January 1, 1930 to June 30, 1930	82,932.07	
Plus interest at 6% from June 30, 1930		
July 1, 1930 to December 31, 1930		91,949.00
Plus interest at 6% from December 31, 1930		
January 1, 1931 to June 30, 1931	$1,765.58	
Plus interest at 6% from June 30, 1931		

[fol. 338] July 1, 1931 to December 31, 1931	90,187.24
Plus interest at 6% from December 31, 1931	
January 1, 1932 to June 30, 1932	79,542.45
Plus interest at 6% from June 30, 1932	
July 1, 1932 to December 31, 1932	71,941.48
Plus interest at 6% from December 31, 1932	
January 1, 1933 to June 30, 1933	62,278.58
Plus interest at 6% from June 30, 1933	
July 1, 1933 to December 31, 1933	67,149.46
Plus interest at 6% from December 31, 1933	
January 1, 1934 to June 30, 1934	55,785.38
Plus interest at 6% from June 30, 1934	
July 1, 1934 to December 31, 1934	76,165.65
Plus interest at 6% from December 31, 1934	
January 1, 1935 to June 30, 1935	67,500.90
Plus interest at 6% from June 30, 1935	
July 1, 1935 to September 30, 1935	28,845.92
Plus interest at 6% from September 30, 1935	
	$963,169.30
September 30, 1935 to July 1, 1936	100,571.36
July 1, 1936 to July 1, 1937	106,857.07
July 1, 1937 to July 1, 1938	113,142.78
July 1, 1938 to July 1, 1939	116,285.63
July 1, 1939 to July 1, 1940	119,428.48

July 1, 1940 to July 1, 1941	122,570.33	
July 1, 1941 to July 1, 1942	125,713.18	
	$804,568.83	
		$1,767,738.13
[fol. 339] Kentucky Fuel Gas Corporation, 1109 Second National Bank Building, Ashland, Kentucky:		
Account	144.61	
Interest at 6% from December 3, 1930 to December 10, 1935	43.55	
		188.16
Total Unsecured Claims		$2,209,369.14

Proofs of Claim Filed by Holders of Common, No Par, Stock of Inland Gas Corporation

	Number of Shares
William H. Heald, Trustee of American Fuel and Power Company, 300 Equitable Building, Wilmington, Delaware (Also Manufacturers Trust Company, Trustee under Indenture of Trust dated July 1, 1929, securing $2,000,000 7% Secured Convertible Gold Notes of American Fuel and Power Company under which these 248,314 shares are pledged as collateral.)	248,314
E. Holt Eliason, Merion, Pa.	114
John Eliason, Llanerch, Pa.	274
Freeman & Company, 30 Pine Street, New York, N. Y.	240
M. M. Hedges, Estate of (American Trust and Banking Corporation, Trustee), Chattanooga, Tenn.	500
W. E. Lockhart, Trustee of Kentucky Fuel Gas Corporation, 1109 Second National Bank Building, Ashland, Kentucky	88,825
Ben Franklin Meyer, % Meyer, Connor & Company, 208 South LaSalle Street, Chicago, Illinois	100
John I. Sowden, 7 Halcyon Place, Yonkers, N. Y.	12

[fol. 340] R. L. Stearns, Trustee for Laura F. Stearns, Pauline D. Stearns, R. L. Stearns, Jr. and Freeman R. Stearns, Ludington, Michigan	200
Joseph A. Zadek, 1206 South Perry St., Montgomery, Ala.	82
Total	338,661

Respectfully submitted, W. E. Lockhart, Trustee of Inland Gas Corporation.

Dated at Ashland, Kentucky, January 30th, 1936.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 989-B
In the Matter of INLAND GAS CORPORATION, Debtor

REPORT OF BEN WILLIAMSON, JR., TRUSTEE OF INLAND GAS CORPORATION RELATING TO THE CLASSIFICATIONS OF CREDITORS AND STOCKHOLDERS; AND PETITION FOR SUCH CLASSIFICATION—Filed March 27, 1944

Ben Williamson, Jr., Trustee of the Inland Gas Corporation, for the purpose of providing information of record upon which the Court may act in fixing the division of the creditors and stockholders of the debtor into classes according to the nature of their respective claims and stock, reports that the claims which have been proven against the [fol. 341] debtor, Inland Gas Corporation, and the claims which, if and when proven and allowed, will be properly payable out of the estate of the debtor, should, in the judgment of the Trustee, be classified as follows, to-wit:

Class I

Fees, allowances, and expenses that the Court may deem proper to the Trustee, Trustee's counsel, creditors' committees and their counsel and other attorneys or individuals who have rendered or who will hereafter render service in the reorganization proceedings and the proceedings prior to the reorganization; and any other costs, expenses, and allowances which may be authorized and

approved by the Court under the provisions of sub-chapter 13, Chapter 10, Title 11, U. S. C. A., or other applicable laws.

Class II

Inland Gas Corporation First Mortgage 6½% Sinking Fund Gold Bonds, Series A, due February 1, 1938, issued under and pursuant to a mortgage or deed of trust dated as of February 1, 1928, between Inland Gas and Chatham Phenix National Bank and Trust Company and James F. McNamara, Trustees, wherein the Manufacturers Trust Company is now the successor corporate trustee, with February 1, 1931 and all subsequent coupons attached.

Of the above described bonds the Columbia Gas and Electric Corporation owns $1,596,600 principal face amount, less 25% or $399,150. which was impounded by Order of the United States District Court, Eastern District of Kentucky, and is held by the Trustee in a separate fund. On October 30, 1943, the United States District Court, Eastern District of Kentucky, denied the enforcement of this claim.

Class III

Inland Gas Corporation Ten Year 7% Sinking Fund Debentures, due February 1, 1938, issued under and pursuant to an indenture dated as of February 1, 1928, between the Inland Gas Corporation and the New York Trust Company as Trustee.

[fol. 342] Inland Gas Corporation 6% Gold Notes, issued under and pursuant to the terms of a Trust Agreement dated as of January 2, 1930, between Inland Gas Corporation and Porter M. Gray, Trustee.

It is believed that the Debentures and Secured Notes are equally and ratably secured by a second mortgage dated January 2, 1930, made by the Inland Gas Corporation to the Ashland National Bank, Trustee.

Of the above described Debentures, the Columbia Gas and Electric Corporation owns $320,100 principal face amount. On October 30, 1943, the United States District Court, Eastern District of Kentucky denied the enforcement of this claim.

Class IV

General Unsecured Creditors. Of these claims the Columbia Gas and Electric Corporation owns $252,313.21. On

October 30, 1943, the United States District Court, Eastern District of Kentucky, denied the enforcement of this claim. (Omitted from Classification is the claim filed by the Carbreath Gas Corporation in the sum of $963,169.30 and the additional claim of that Company in the sum of $804,568.83, both of which claims have been objected to by the Inland Trustee.)

Class V

Stockholders. (No Par Common Stock.)

Ben Williamson, Jr., as Trustee of the aforesaid debtor corporation, states that he believes the aforesaid division of creditors and stockholders into classes provides a proper division and classification according to the nature of the respective claims and stock; and that all of the said claims and stocks should be so classified into the aforesaid respective classifications except such claims as may from time to time accrue or be or become payable for or on account of Federal, State, and local taxes, Workmen's Compensation claims and any other like or similar claims all of which the Trustee believes should be treated as other necessary current operating expenses and should not be separately classified.

[fol. 343] Ben Williamson, Jr., as Trustee of the Inland Gas Corporation, hereby requests that the Court fix a hearing, upon notice to the holders of secured claims, the debtor, the Trustee, and such other persons as the Court may designate, to fix and determine the division of creditors and stockholders of the Inland Gas Corporation into classes according to the nature of their respective claims and stock.

Respectfully submitted, Clifford E. Smith, Attorney for Ben Williamson, Jr., Trustee, Inland Gas Corporation.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtor

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

ORDER—Entered and Filed March 27, 1944

This day came Ben Williamson, Jr., Trustee of the Inland Gas Corporation and Trustee of the Kentucky Fuel Gas Corporation, by his attorney, Clifford E. Smith, and tendered and offered to file the following:

[fol. 344] In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

Report of Ben Williamson, Jr., Trustee of Inland Gas Corporation Relating to the Classifications of Creditors and Stockholders; and Petition for Such Classification.

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

Report of Ben Williamson, Jr., Trustee of Kentucky Fuel Gas Corporation Relating to the Classifications of Creditors and Stockholders; and Petition for Such Classification.

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

Petition of Ben Williamson, Jr., Trustee of the Kentucky Fuel Gas Corporation for a Determination as to Whether or not Further Distribution to the Bondholders of the Kentucky Fuel Gas Corporation Should Now Be Made, and for a Determination of Questions Incident or Relating Thereto.

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

[fol. 345] Petition of Ben Williamson, Jr., Trustee of the Inland Gas Corporation and Trustee of the Kentucky Fuel Gas Corporation, for the Advice and Directions of the Court With Respect to Whether or Not Any Further Steps Should Be Taken or Expenses Incurred in the Further Prosecution of Actions Pending Against the Columbia Gas and Electric Corporation, et al., in the District Court of the United States, District of Delaware.

The foregoing reports and petitions of the Trustee hereby are ordered filed.

It is further ordered that the Clerk of this Court be and he hereby is directed to mail a copy of each of the foregoing reports and petitions to the attorneys of record for the parties in interest.

It is further ordered by the Court that a hearing on all of the aforesaid reports and petitions hereby is set beginning on Tuesday, April 11, 1944, at 10:00 a. m., or as soon thereafter as the same can be reached, in the Federal District Court room, Federal Building, Lexington, Kentucky; and the Clerk hereby is directed to send an attested copy of this order to each of the respective parties in interest or to their attorneys.

H. Church Ford, Judge.

[fol. 346] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

ORDER—Entered and Filed May 13, 1944

This cause coming on to be heard upon the report of Ben Williamson, Jr., Trustee of the Inland Gas Corporation, relating to the classification of creditors and stockholders and the Trustee's petition for such classification,

filed herein on March 27, 1944, and the Court having considered the same and the objections thereto, it is now ordered by the Court that the following classification of the creditors and stockholders of Inland Gas Corporation be and the same hereby is made and approved:

Class I

Fees, allowances, and expenses that the Court may deem proper to the Trustee, Trustee's counsel, creditors' committees and their counsel and other attorneys and individuals who have rendered, or who hereafter render, services in the reorganization proceedings and the proceedings prior to reorganization; and any other costs, expenses and allowances which may be authorized and approved by the Court under the provisions of sub-chapter 13, Chapter 10, Title 11, U. S. C. A. or other applicable laws; and State, local and Federal Taxes, and any other claims having priority by law.

Class II

All claims secured by a first and superior lien on the assets of the Inland Gas Corporation.

[fol. 347]

Class III

All claims secured by a lien on assets of the Inland Gas Corporation inferior or subordinate to claims within Class I.

Class IV

All secured claims inferior to secured claims coming within Classes II and III.

Class V

General and unsecured creditors.

Class VI

Stockholders of Inland Gas Corporation.

H. Church Ford, Judge.

May 13, 1944.

[fol. 348] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 115

In the Matter of AMERICAN FUEL AND POWER COMPANY, Debtor

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 991-B

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor

ORDER AND JUDGMENT—Entered and Filed May 13, 1944

These causes coming on to be heard upon the application of the VanHorn Committee for Distribution to the First Mortgage Bondholders of the Inland Gas Corporation, which application was filed November 3, 1943; and upon the response thereto and petition for advice of Ben Williamson, Jr., as Trustee of Inland Gas Corporation, which response and petition was filed on December 3, 1943; and upon the various responses, petitions and objections filed by interested parties with respect thereto; and the Court having considered said application for distribution, said response and petition for advice, and the various other responses, pleadings, and objections filed herein relating thereto, including all of the record and proceedings heretofore had in the above-entitled causes and in the antecedent equity receivership causes in this Court, and having heard and considered the evidence, the arguments, and the briefs relating thereto, and it appearing to the Court that a determination of said questions is necessary to a determination of the application for distribution filed by the VanHorn [fol. 349] Committee, the Court now finds, orders and adjudges as follows, to-wit:

FINDINGS OF FACT

I

No intervening liens were perfected on any of the assets of the Inland Gas Corporation between the time of the appointment of the equity receiver of the said company and

the appointment of the Trustee in Bankruptcy of said Company.

II

The Mortgage or Deed of Trust, dated February 1, 1928, between the Inland Gas Corporation and the Chatham-Phoenix National Bank and Trust Company and James F. McNamara, Trustees, securing the Inland Gas Corporation First Mortgage 6½% Sinking Fund Gold Bonds, Series A, due February 1, 1938, by the terms thereof gave said Bondholders a first lien on the assets of the Inland Gas Corporation described in said Mortgage or Deed of Trust; and in addition thereto a first lien on all after acquired property and the net earnings from the conduct of the business of Inland Gas Corporation.

III

The cash on hand and securities held by Ben Williamson, Jr., as Trustee of the Inland Gas Corporation, were acquired and accumulated through the operation by the equity receiver of the Inland Gas Corporation and by Ben Williamson, Jr., as Trustee of the Inland Gas Corporation and by his predecessor Trustee.

(a) Through the operation of the gas properties which were owned by Inland Gas Corporation prior to the time of the appointment of the equity receiver of said Corporation, all of which property was subject to the first lien of the Mortgage or Deed of Trust hereinabove referred to.

(b) Through the operation of the gas properties which were subsequently acquired by the equity receiver or the Trustee in Bankruptcy of said Inland Gas Corporation, [fol. 350] pursuant to appropriate orders of this Court, and all of which properties were paid for with funds of the estate which otherwise would have been held for the benefit of the First Mortgage Bondholders of the Inland Gas Corporation.

(c) Through the purchase of gas which was not produced from property owned or leased by the Inland Gas Corporation on the equity receiver of said Corporation or the Trustee in Bankruptcy of said Corporation, but which gas was paid for out of the funds which otherwise would have been held, subject to the orders of this Court, for the

benefit of said First Mortgage Bondholders of Inland Gas Corporation and which gas was marketed and sold by the equity receiver or Trustee in Bankruptcy of said Corporation by the use of funds, property, and facilities of the estate owned and held by Inland Gas Corporation or the Trustee in Bankruptcy of said Corporation.

Conclusions of Law

The Court finds and adjudges that the law applicable to the respective issues herein is as follows, to-wit:

I

The terms and provisions of the Mortgage or Deed of Trust, dated as of February 1, 1928, between the Inland Gas Corporation and the Chatham-Phoenix National Bank and Trust Company and James F. McNamara, Trustees, wherein the Manufacturers Trust Company is now the successor-corporate trustee, by its terms gave to the holders of the Inland Gas Corporation First Mortgage 6½% Sinking Fund Gold Bonds, Series A, due February 1, 1938, a first lien to secure the payment of said Bonds and the coupons attached thereto and interest thereon on all of the property of the Inland Gas Corporation described therein and on all after acquired property and net earnings of the Inland Gas Corporation, of the equity receiver, and of the Trustee in Bankruptcy of said Corporation.

[fol. 351]

II

That said Bondholders have a first lien on the properties acquired by the equity receiver and by the Trustee in Bankruptcy of said Corporation, which properties were acquired pursuant to appropriate orders of this Court and paid for out of the funds which otherwise would have been applicable to the payment of the said First Mortgage Bonds and coupons and interest thereon.

III

The net earnings derived by the Trustee in Bankruptcy of said Inland Gas Corporation and by the equity receiver of said Corporation from the operation of the properties owned by the Inland Gas Corporation, including property acquired subsequently by said receiver and by said Trus-

tee in Bankruptcy and further including the net income from the purchase and sale of gas by the receiver and by said Trustee, is subject to the lien of said Mortgage or Deed of Trust; and that said funds, subject to the orders of this Court, are held by the Trustee in Bankruptcy of said Corporation for the benefit of said holders of the said First Mortgage Bonds and coupons until said Bonds, coupons, and all interest thereon are paid in full.

IV

That the said First Mortgage Bonds and the coupons attached thereto bear simple interest at the rate provided in said Mortgage or Deed of Trust from the respective due dates of said Bonds and of said coupons until paid.

V

The Court reserves judgment on the question as to whether or not the judgment of the Court cancelling the claims of the Columbia Gas and Electric Corporation results in taxable income within the meaning of the State or Federal Income Tax laws.

[fol. 352]

VI

Neither the debenture holders nor the general claimants have any right, based either upon subrogation or upon any other ground or basis, to participate in or share with the First Mortgage Bondholders in the distribution of the income or assets of the Inland Gas Corporation until the holders of the said First Mortgage Bonds and coupons attached thereto shall have been paid in full, including any and all accrued and unpaid interest on said coupons and on said bonds.

VII

Before the distribution applied for by the VanHorn Committee will be made, the Court will require the owners and holders of the Inland Gas Corporation First Mortgage Bonds to file with the Trustee proof of ownership; and each claimant will be required to make a full and complete disclosure of all material facts pertaining to his ownership, including, but not limited to, the serial number and denomination of each Bond owned or in which he has a beneficial interest, directly or indirectly, the date each

Bond was acquired, the price paid for each Bond, from whom acquired (the name of the broker through whom purchased may be treated as the person from whom purchased), whether or not the claimant now owns or has previously owned any other securities of Inland Gas Corporation; and if so, the amount and nature thereof and when acquired and when disposed of.

The Trustee will prepare a form for the proof of ownership, which, when approved by the Court, the Trustee will have printed; and the Trustee will mail to all bondholders, at their last known address, a printed form and will supply each of the Committees with printed forms.

The Court reserved judgment as to whether or not the owners of any of said Bonds shall be limited in their recovery or in their voting rights to the price paid for such Bonds.

No Bondholder shall participate in any further distribution until he files with the Trustee proof of ownership on [fol. 353] the form and with the full data required as indicated by the questions on the form and proof of ownership herein directed to be furnished by the Trustee.

VIII

The Court finds and adjudges that the net earnings from the sale of gas on all property owned by the Inland Gas Corporation, including all property acquired by the equity receiver and the Trustee in Bankruptcy of such Corporation and all accruals and profits derived therefrom and all net earnings from the purchase and sale of gas are by the terms of the aforesaid Mortgage or Deed of Trust subject to the lien thereof for the security of said First Mortgage Bondholders; and that all property so acquired and all cash on hand and securities held by the Trustee derived therefrom shall be held and applied pursuant to the orders of the Court for the payment of said First Mortgage Bonds and coupons attached thereto and interest thereon until said Bonds, coupons, and interest shall have been paid in full.

IX

The Court takes under advisement the application of the VanHorn Committee for further distribution to the First Mortgage Bondholders of Inland Gas Corporation and the

probable effect thereof upon ultimately working out a plan of reorganization.

H. Church Ford, Judge.

May 13, 1944.

[fol. 354] COPY OF FORM OF FIRST MORTGAGE 6½% SINKING FUND GOLD BONDS SERIES A, AND COPY OF FORM OF COUPONS ATTACHED TO SERIES A BONDS FOUND ON PAGES 4 TO 12 INCLUSIVE IN MORTGAGE DEED OF TRUST &C. FILED AS AN EXHIBIT WITH BILL OF COMPLAINT OF CHATHAM-PHENIX NATIONAL BANK AND TRUST CO. AND JAMES F. MCNAMARA, TRUSTEES AGAINST THE INLAND GAS CORP., ET AL.—Filed April 15, 1931

(Form of $1,000 Bond)

Number —— $1,000.

United States of America

State of Delaware

Inland Gas Corporation

First Mortgage 6½% Sinking Fund

Gold Bond, Series A

Due February 1, 1938

Inland Gas Corporation, a corporation duly organized and existing under the laws of the State of Delaware (hereinafter sometimes termed the "Company"), hereby acknowledges itself indebted and, for value received, hereby promises to pay, on the first day of February, 1938 (unless this bond be sooner redeemed as hereinafter provided), to bearer, or, if registered as to principal, to the registered owner of this bond at the principal office of the Chatham Phenix National Bank and Trust Company, or its successor in trust under the Indenture hereinafter mentioned (hereinafter called the Trustee), in the Borough of Manhattan, City and State of New York, or, at the option of the bearer or such registered owner, at the principal office of the Continental National Bank and Trust Company in the City of Chicago, State of Illinois, One Thousand Dollars ($1,000.) in gold coin of the United States of America of the stand-

ard of weight and fineness existing on February 1, 1928, and [fol. 355] to pay interest thereon from February 1, 1928, at the rate of six and one-half per centum (6½%) per annum in like gold coin, semi-annually, on the first day of August and the first day of February in each year, at the said office of the Trustee in the Borough of Manhattan, City and State of New York, or at the option of the bearer of the coupons hereto annexed, at said office of the Continental National Bank and Trust Company in the City of Chicago, State of Illinois, upon presentation and surrender as they severally mature, of the coupons for such interest hereto annexed.

Both principal of and interest on this bond are payable without deduction therefrom for any tax, assessment, or governmental charge (except any normal Federal income tax with respect thereto in excess of two per centum per annum) which the Company, its successors or assigns, or the Trustees, or either of them, or any paying agent of the Company, may be required or permitted to pay thereon or retain or deduct therefrom under any present or future law of the United States of America.

Upon the conditions provided in the Indenture hereinafter mentioned, the Company will reimburse any bearer or registered owner of this bond for any personal property tax and/or securities tax not exceeding in any year six mills on each dollar of the principal amount, levied or assessed in respect of the principal amount of this bond by any State of the United States and/or by the District of Columbia, while in the hands of a resident of any such State or District, or paid to procure the partial or total exemption of this bond from taxation, and/or for any income tax imposed by any such State or District on account of the income derived from this bond, not, however, exceeding in any year six per centum of such income; all as in said Indenture more particularly provided, and in the manner and subject to the limitations therein set forth, if request for such reimbursement be made within sixty days after the payment of such tax.

This bond is one of the First Mortgage Gold Bonds of the Company, issued and to be issued under and pursuant to and all equally secured by an Indenture of Mortgage or [fol. 356] Deed of Trust dated as of February 1, 1928, executed by the Company to Chatham Phenix National Bank and Trust Company and James F. McNamara, as Trustees

(herein termed the "Indenture"), reference is hereby made to the Indenture (and any and all supplements thereto) for a description of the properties mortgaged and conveyed or assigned to said Trustees, or their successors, the nature and extent of the security and the rights of the Trustees and the holders of the bonds issued thereunder and secured thereby; to all the provisions of which Indenture the bearer or registered owner, by the acceptance hereof, assents.

The said First Mortgage Gold Bonds are issuable in series and the different series may be for varying limited aggregate principal amounts, and the bonds of any one series may differ from the bonds of any other series as to date, maturity, interest rate, sinking fund provisions (if any) stock purchase rights (if any) and otherwise, all as in the Indenture provided and/or permitted.

The bonds of Series A, in which this bond is included, are designated "First Mortgage 6½% Sinking Fund Gold Bonds, Series A," and are limited to $4,400,000 in aggregate principal amount, and are issued in denominations of One Thousand Dollars, Five Hundred Dollars, and One Hundred Dollars, and are interchangeable as between said denominations of Series A bonds, as in the Indenture provided.

The bonds of Series A are entitled to the security and benefits of a sinking fund to be established, maintained and applied as provided in the Indenture.

In case of the happening of an event of default as defined in the Indenture, the principal sum of the bonds of each and every series issued and outstanding thereunder may be declared and may become due and payable forthwith in the manner and with the effect in the Indenture provided.

This bond (and all or any bonds of Series A) may, at the option of the Company, be redeemed at any time prior to the expressed maturity, after notice by publication in at least one daily newspaper printed in the English language and published and of general circulation in the Borough [fol. 357] of Manhattan, City and State of New York, and in at least one such newspaper published and of general circulation in the City of Chicago, State of Illinois, once a week for four successive weeks, the first publication to be not less than thirty nor more than forty-five days before such redemption date, by payment of the principal amount thereof and interest thereon to the date fixed for such redemption and a premium determined as follows:

If redeemed on or before February 1st, 1933, a premium of five per centum (5%) of such principal; and if redeemed thereafter and on or before February 1st, 1934 a premium of four per centum (4%) of such principal; and if redeemed thereafter and on or before February 1st, 1935 a premium of three per centum (3%) of such principal; and if redeemed thereafter and on or before February 1st, 1936 a premium of two per centum (2%) of such principal; and if redeemed thereafter on or before February 1st, 1937 a premium of one per centum (1%) of such principal; and if redeemed thereafter, prior to maturity, without any premium; all in the manner and upon the conditions provided in the Indenture.

The faith and credit of the Company are pledged for the payment of this bond and of the interest hereon, according to the tenor and effect hereof but this bond is a corporate obligation only and no recourse whatsoever, either directly or through any trustee, receiver, assignee or other person shall be had for the payment of the principal or the interest of this bond, or any part thereof, or for any claim based thereon, or otherwise in respect thereof or of the Indenture, against any incorporator or any past, present or future stockholder, officer or director, as such, of the Company, or of any successor company, by virtue of any statute, constitution or rule of law, or by the enforcement of any assessment, penalty, or otherwise, all such individual liability of whatsoever kind or nature of such incorporators, stockholders, officers or directors, as such, being, by the acceptance hereof and as part of the consideration of the issue hereof, expressly released.

This bond shall pass by delivery unless registered as to principal in the owner's name on the books of the Com- [fol. 358] pany, at the principal office of the Trustee in the Borough of Manhattan, City and State of New York, or at the principal office of the Continental National Bank and Trust Company, in the City of Chicago, State of Illinois, such registry being noted hereon, after which no transfer shall be valid unless made at one of said offices by the registered owner or his attorney duly authorized in writing and similarly noted hereon, but the same may be discharged from such registry by being in like manner, transferred to bearer (in which case it shall pass by delivery) but it may again and from time to time be registered and discharged from registry as aforesaid. The registry of this bond shall

not affect the negotiability of the interest coupons hereto attached, which shall at all times be payable to bearer and pass by delivery.

The bearer or registered owner hereof may at any time on or before February 1, 1938, purchase, as a unit, ten (10) full paid and non-assessable shares of the common capital stock without par value of the Company, at the following prices:

(a) $5.00 per share if paid for on or before February 1, 1931;

(b) $7.50 per share if paid for thereafter and on or before February 1, 1933;

(c) $10.00 per share if paid for thereafter and on or before February 1, 1935;

(d) $12.50 per share if paid for thereafter and on or before February 1, 1936;

(e) $15.00 per share if paid for thereafter and on or before February 1, 1938;

(payment thereof to be made to the Trustee under the Indenture at its principal office, either in cash or by certified check or bank draft drawn upon New York funds) and the Company agreed to cause to be issued to such bearer or registered owner or his nominee according to the terms of the Indenture a certificate or certificates for such shares upon the presentation hereof, within the time aforesaid, at the principal office of said Trustee for a notation hereon [fol. 359] in the manner provided in said Indenture of the fact of the exercise of such stock purchase privilege or in lieu thereof to issue a certificate for such shares upon the surrender of the purchase certificate which, as provided in the Indenture, shall be issued in the event of the prior redemption of this bond, to evidence the continuation to and including February 1, 1938, of the stock purchase privilege in this paragraph set forth. In case the Company shall, prior to February 2, 1938, issue additional common stock under certain circumstances set forth in the Indenture, the purchase price of the shares called for by this bond is subject to reduction, as provided in the Indenture.

Neither this bond, nor any coupon for interest hereto attached shall be entitled to any benefit under the Indenture or be valid or become obligatory for any purpose,

until this bond shall have been authenticated by the certificate hereon endorsed duly signed by the Trustee.

In Witness Whereof, Inland Gas Corporation has caused this bond to be executed by its President or a Vice-President and its corporate seal to be hereunto affixed, and attested by its Secretary or an Assistant Secretary, and coupons for interest bearing the facs-mile signature of its Treasurer to be hereunto attached, all as of the first day of February, 1928.

Inland Gas Corporation, by —— ——, President.

Attest: —— ——, Secretary.

(Form of Coupon)

(Attached to $1,000 bond)

No. — $32.50

On the first day of —, 19—, unless the bond hereinafter mentioned shall have been called for previous redemption, Inland Gas Corporation will pay to the bearer at the principal office of Chatham Phenix National Bank and Trust Company, in the Borough of Manhattan, City [fol. 360] and State of New York, or, at the option of the bearer, at the principal office of the Continental National Bank and Trust Company in the City of Chicago, State of Illinois, on surrender of this coupon, Thirty-two and 50/100 Dollars ($32.50) in gold coin of the United States of America of or equal to the standard of weight and fineness existing on February 1, 1928, without deduction for any taxes to the extent provided in the bond hereinafter mentioned being six months' interest then due on its First Mortgage 6½% Sinking Fund Gold Bond, Series A, No. —.

—— ——, Treasurer.

(Form of Trustee's Certificate)

This bond is one of the bonds of the series designated therein, described in the within-mentioned Indenture.

Chatham Phenix National Bank and Trust Company, Trustee, by —— ——, Authorized Officer.

Notice: No writing on this bond except by an officer or agent of the Company.

Date Registered	In Whose Name Registered	Registrar

[fol. 361] EXHIBIT—SECTIONS 8 AND 9 OF ARTICLE 7—FILED WITH BILL OF COMPLAINT OF CHATHAM-PHOENIX NATIONAL BANK AND TRUST CO. AND JAMES F. MCNAMARA, TRUSTEES AGAINST THE INLAND GAS CORPORATION, ET AL.—Filed April 15, 1931

Section 8. As additional security for the bonds, the Company covenants and agrees with the Trustees that if default be made in any payment of principal due on any bond (whether by maturity, call for redemption, declaration by the Trustees, or otherwise), it will on demand of the Trustees forthwith pay to the Trustees for the benefit of the bondholders a sum equal to the total amount then due for principal and interest on all the bonds with interest from the due dates thereof, less only such sums as may be in the sinking fund of any particular series, applicable to the redemption and/or payment of bonds of such series (but moneys held by the Trustee in accordance with the provisions of Section 5 of Article Three hereof for the redemption of Bonds theretofore called for redemption shall continue to be held by the Trustee for the particular bonds so theretofore called for redemption). Should said sums not be so paid to the Trustees they may at any time in their own name and as Trustees of an express trust, recover judgment against the Company for the same, crediting the Company with any amounts theretofore received by the Trustees and distributable to bondholders from any sale of the mortgaged property.

The right of the Trustees to secure such judgment and to issue execution thereon shall be independent of and in no way affected by any other right given to them or action taken by them nor shall any such judgment or execution in any way effect the lien hereof upon the mortgaged property, or other rights, powers or remedies of the Trustees or bondholders.

Upon the happening of any event or default, as specified in Section 2 of this Article, the Trustees, and their successors, acting for themselves, or by an attorney or agent duly appointed in writing, at any time after default or failure as aforesaid, are hereby empowered and author-
[fol. 362] ized to take any and all such action as to them may seem expedient for the enforcement, foreclosure, protection, sale or other disposition of any and all property, rights, contracts, liens and/or charges of any kind or de-

scription which may from time to time after the date hereof be conveyed, mortgaged, pledged, assigned or transferred to the Trustees, to be held as part of the mortgaged property; and the Company hereby constitutes and appoints the Trustees the agents and attorney of the Company, irrevocably, to take any and all such action; any moneys realized by the Trustees thereon shall be applied pursuant to the provisions of Section 9 of this Article.

Section 9. Any money received by the Trustees from the operation or sale of the mortgaged property or pursuant to any right given them or action taken by them under the provisions of this Article shall, together with all other funds then held by them hereunder, be applied to:

(1) All proper costs, expenses and liabilities incurred by the Trustees hereunder, proper compensation to them and all liens or charges on the mortgaged property prior hereto which, in the uncontrolled discretion of the Trustees it is advisable to pay.

(2) To prorate the balance among the various series of bonds issued hereunder, in such proportion as the total principal amount of the bonds of such series then outstanding bears to the total principal amount of bonds of all series then outstanding; such amount so pro rata to be set aside and reserved for the benefit of the holders of bonds and coupons of such respective series, and such moneys, together with funds (if then any) held in the sinking fund of such particular series (other than sums which may then be held for the redemption or payment of bonds and coupons theretofore called for redemption), shall be applied by the Trustees to the payment of the whole amount then owing or unpaid upon the bonds of such series issued hereunder and then outstanding for principal and interest, with interest on overdue principal and overdue installments of interest at the same rates respectively [fol. 363] as were borne by the respective bonds, whereof the principal or installments of interest may be overdue, and in case such moneys shall be insufficient to pay in full the whole amount so due and unpaid upon the bonds of such series issued hereunder and then outstanding, then to the payment of such principal and interest without preference or priority of principal.

over interest or of interest over principal or of any installment of interest over any other installment of interest on the bonds of such series, ratably to the aggregate amount of such principal and the accrued and unpaid interest, subject however, to the provisions of Section 3 of Article Five; such payments shall be made on the date fixed therefor by the Trustees upon presentation of the several bonds and coupons of the respective series and stamping thereon the amount paid if such bonds and coupons be only partially paid, and upon surrender and cancellation thereof, if fully paid.

If the amount so pro rated to any particular series (together with the amounts in the sinking fund applicable thereto) is in excess of the amount required to redeem and pay all the outstanding bonds of such series, then such excess to be pro rated among the other series for which adequate moneys have not been so provided;

(3) To the payment of the surplus, if any, to the Company, its successors or assigns, or to whosoever may be lawfully entitled to receive the same or as a court of compentet jurisdiction may direct.

[fol. 364] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In the Matter of INLAND GAS CORPORATION, Debtor

In Bankruptcy No. 989-B

NOTICE OF APPEAL—Filed June 7, 1944

Notice is hereby given that Carl B. Early, Daniel Matthews, Thomas Matthews, Jack Patton and P. G. Meador, owners and holders of 10-Year 7% Debentures issued by the Inland Gas Corporation, hereby appeal to the United States Circuit Court of Appeals for the Sixth Circuit from an order and judgment rendered by the Honorable H. Church Ford, District Judge of the Eastern District of Kentucky, sitting as a court of bankruptcy allowing the claim of the owners and holders of the First Mortgage

6½% Sinking Fund Gold Bonds, Series A, issued by the Inland Gas Corporation interest on past due or matured interest coupons attached to said First Mortgage 6½% Sinking Fund Gold Bonds, Series A, and allowing said claimants a lien upon all the property and assets owned and possessed by said bankrupt estate for interest on said coupons which order or judgment allowing said claims and lien was entered on the 13th day of May, 1944.

Carl B. Early, Daniel Matthews, Thomas Matthews, P. G. Meador, Jack Patton.

H. W. Bowers, Attorney for Appellants.

[fol. 365] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

ASSIGNMENT OF ERRORS—Filed June 7, 1944

Now comes Carl B. Early, Daniel Matthews, Thomas Matthews, Jack Patton and P. G. Meador, and assigns error to the decision of the said District Court sitting as a Court of Bankruptcy in its order and judgment entered herein on the 13th day of May, 1944.

First: The Court erred in finding as a matter of law that the terms and provisions of the Mortgage or Deed of Trust dated as of February 1, 1928, by the Inland Gas Corporation to the Chatham-Phoenix National Bank and Trust Company and James F. McNamara, Trustees, by its terms gave the holders of the Inland Gas Corporation, First Mortgage 6½% Sinking Fund Gold Bonds, Series A, a first lien to secure interest on attached coupons on all the property of the Inland Gas Corporation described therein, and all after acquired property and net earnings of the Inland Gas Corporation, of the equity receiver, and of the trustee in bankruptcy of said corporation.

Second: The Court erred in holding that the bondholders have a first lien on the properties acquired by the equity receiver and by the trustee in bankruptcy of said corpora-

tion which properties were acquired pursuant to appropriate orders by said Court and paid for out of funds which otherwise would have been applicable in the payment of said First Mortgage Bonds to secure the payment of interest upon coupons attached to said Bonds.

Third: The Court erred in finding that the coupons attached to the first Mortgage Bonds bear interest at the rate [fol. 366] provided in said Mortgage or Deed of Trust from their respective due dates of said bonds and of said coupons until paid.

Fourth: The Court erred in finding that the Debenture holders and general claimants have no right to participate or share with the First Mortgage Bondholders in the distribution of the income or assets of the Inland Gas Corporation until interest has been paid in full on all past due coupons attached to said bonds.

Fifth: The Court erred in finding and adjudging that the net earnings from the sale of gas on all property owned by the Inland Gas Corporation, including all property acquired by the equity receiver and the trustee in bankruptcy of such corporation and all accruals and profits derived therefrom and all net earnings from the purchase and sale of gas are by the terms of the Mortgage or Deed of Trust securing said First Mortgage Bonds; and that all property so acquired and all cash on hand and securities held by the trustee derived therefrom shall be held and applied for the payment of interest upon past due coupons attached to said First Mortgage Bond.

Wherefore, said Carl B. Early, Daniel Matthews, Thomas Matthews, Jack Patton and P. G. Meador, pray that the judgment and order of the District Court of the United States of the Eastern District of Kentucky sitting as a court of bankruptcy be reversed and that the said District Court be directed to disallow all the claims for interest on past due and matured coupons attached to the First Mortgage Bonds issued by the Inland Gas Corporation and disallow any lien against the property of said bankrupt estate securing the payment thereof.

H. W. Bowers, Attorney for Carl B. Early, Daniel Matthews, Thomas Matthews, Jack Patton, P. G. Meador.

[fol. 367] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

ORDER—Entered and Filed June 7, 1944

Now comes Carl B. Early, Daniel Matthews, Thomas Matthews, Jack Patton and P. G. Meador, by H. W. Bowers, their Attorney, and offered for filing their notice of appeal from the judgment of this court entered herein on the 13th day of May, 1944; and their appeal bond for the sum of $250.00 payable to Ben Williamson, Trustee in Bankruptcy, for the Inland Gas Corporation, and their assignment of error to said judgment which notice of appeal, bond and assignment of error is now ordered filed.

H. Church Ford, Judge.

[fol. 368] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

ORDER—Filed June 15, 1944

This day came Carl B. Early, Daniel Matthews, Thomas Matthews, Jack Patton and P. G. Meador, and offered for filing Designation of Record on Appeal and Points of Error Relied upon Appeal, and the Court being advised it is ordered that the Designation of Record on Appeal and Points of Error Relied upon Appeal, be and are now filed and noted of record.

H. Church Ford, Judge, U. S. District Court. Certified by A. B. Rouse, Clerk.

[fol. 369] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT LEXINGTON

In Bankruptcy No. 989-B

In the Matter of INLAND GAS CORPORATION, Debtor

STATEMENT OF POINTS OF ERROR RELIED ON BY APPELLANTS—Filed June 15, 1944

Now comes Carl B. Early, Daniel Matthews, Thomas Matthews, Jack Patton and P. G. Meador, and assigns the following points of error to the decision of the said District Court sitting as a Court of Bankruptcy in its order and judgment entered herein on the 13th day of May, 1944.

First: The Court erred in finding as a matter of law that the terms and provisions of the Mortgage or Deed of Trust dated as of February 1, 1928, by the Inland Gas Corporation to the Chatham-Phoenix National Bank and Trust Company and James F. McNamara, Trustees, by its terms gave the holders of the Inland Gas Corporation, First Mortgage 6½% Sinking Fund Gold Bonds, Series A, a first lien to secure interest on attached coupons on all the property of the Inland Gas Corporation described therein, and all after acquired property and net earnings of the Inland Gas Corporation, of the equity receiver, and of the trustee in bankruptcy of said corporation.

Second: The Court erred in holding that the bondholders have a first lien on the properties acquired by the equity receiver and by the trustee in bankruptcy of said corporation which properties were acquired pursuant to appropriate orders by said Court and paid for out of funds which otherwise would have been applicable in the payment of said First Mortgage Bonds to secure the payment of interest upon coupons attached to said Bonds.

Third: The Court erred in finding that the coupons attached to the first Mortgage Bonds bear simple interest [fol. 370] at the rate provided in said Mortgage or Deed of Trust from the respective due dates of said coupons until paid.

Fourth: The Court erred in finding that the Debenture holders and general claimants have no right to participate

or share with the First Mortgage Bondholders in the distribution of the income or assets of the Inland Gas Corporation until interest has been paid in full on all past due coupons attached to said bonds.

Fifth: The Court erred in finding and adjudging that the net earnings from the sale of gas on all property owned by the Inland Gas Corporation, including all property acquired by the equity receiver and the trustee in bankruptcy of such corporation and all accruals and profits derived therefrom and all net earnings from the purchase and sale of gas are by the terms of the Mortgage or Deed of Trust securing said First Mortgage Bonds; and that all property so acquired and all cash on hand and securities held by the trustee derived therefrom shall be held and applied to the payment of interest upon past due coupons attached to said First Mortgage Bond.

[fol. 371] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY IN LEXINGTON

989-B

In Re: INLAND GAS CORPORATION, Debtor

APPELLANTS DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed June 15, 1944

To the Clerk of Said Court:

In the matter of Appeal of Carl B. Early, Daniel Matthews, Thomas Matthews, Jack Patton and P. G. Meador.

Please make transcript of the following named papers in the above titled matter:

(1) The petition of W. J. K. Vanstan Committee filed on October 15, 1935. Applying for reorganization of Inland Gas Corporation under 77B.

(2) Order of October 26, 1935, appointing temporary Trustee.

(3) Order of October 26, 1935, making temporary Trustee permanent, and approving Petition in Bankruptcy for reorganization of Inland Gas Corporation.

(4) Order of June 26, 1937, appointing Ben Williamson, Jr., Trustee.

(5) Petition of the VanHorn Committee for distribution of assets of Inland Gas Corporation, filed November 3, 1943.

(6) The order filing said petition.

(7) Response and petition for advice of Ben Williamson, Jr., Trustee, of the Inland Gas Corporation to said petition for distribution. Filed November 13, 1943.

(8) Order of December 3, 1944.

[fol. 372] (9) Order of February 21, 1944, setting date for hearing on petition for Distribution and Response.

(10) Proof of claim made by the VanHorn Committee and the Vanstan Committee of First Mortgage 6½% Gold Bonds, Series A.

(11) Proof of claim of Paul Committee proving claim of 10 Year 7% Debentures. (If Mortgage or Deed of Trust from Inland Gas Corporation to Ashland National Bank, Trustee, dated as of January 2, 1930, is an exhibit to said proof of claim, please do not copy.)

(12) The report and petition of Ben Williamson, Jr., Trustee, of Inland Gas Corporation relating to the classification of creditors and stockholders and order filing said petition.

(13) Classification of claims made by the Court, filed May 3, 1944.

(14) Order and judgment containing findings of facts and conclusions of law filed on the 13th day of May, 1944.

(15) Copy of form of First Mortgage 6½% Sinking Fund Gold Bond Series A, and also copy of form of coupons attached to Series A Bonds, found on pages 4 to 12 inclusive in the Mortgage or Deed of Trust of the Inland Gas Corporation to Chatham-Phoenix National Bank and Trust Company to James F. McNamara, Trustees, filed as an exhibit with the Bill of Complaint of Chatham-Phoenix National Bank and Trust Company and James F. McNamara, Trustees, against the Inland Gas Corporation, et al., on or about April 15, 1931.

(16) Copy from the aobve exhibit, sections 8 and 9 of Article 7.

(17) Notice of Appeal.

(18) Assignment of Error.

(19) Order filing Notice of Appeal, Bond and Assignment of Error.

(20) Appellants designation points of error.

(21) This designation of contents of record.

(22) Your certificate.

[fols. 373-374] You will please file said transcript with the clerk of the United States Circuit Court of Appeals, from the Sixth Circuit.

Dated this 14 day of June, 1944.

H. W. Bowers, Attorney for Carl B. Early, Daniel Mathews, Thomas Matthews, Jack Patton, P. G. Meador.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, A. B. Rouse, Clerk of the United States District Court in and for the Eastern District of Kentucky, do certify that the annexed and foregoing 72 pages contain a true and full copy of the record as per designation filed June 15, 1944, in the case of Inland Gas Corporation, Debtor, No. 989, Lexington Docket (with the exception of Items 10 and 11 wherein report of Trustee as to Proofs of Claims filed Jan. 31, 1936 is substituted) as the same appears from the records of this office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Lexington this 8th day of July, A. D., 1944.

A. B. Rouse, Clerk U. S. District Court, Eastern District of Kentucky. (Seal.)

[fol. 375] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SIXTH CIRCUIT

CAUSES ARGUED AND SUBMITTED—FEBRUARY 19, 1945

Before: Hicks, Simons and Martin, JJ.

These causes are argued together by Jay Raymond Levinson and Charles I. Dawson for Appellants and by George W. Jaques, Robert J. Bulkley and C. J. Odenweller for Appellees and are submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—No. 9845—Entered October 9, 1945

Appeal from the District Court of the United States for the Eastern District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed in all respects indicated in the opinion of the court this day filed, and is reversed with respect to the allowance of interest upon the interest coupons, as indicated in said opinion; and the case is remanded for further proceedings in conformity with the opinion of this court. The costs on appeal to be divided equally between the parties.

[fol. 376] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—No. 9846—Entered October 9, 1945

Appeal from the District Court of the United States for the Eastern District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby

affirmed in all respects indicated in the opinion of the court this day filed, and is reversed with respect to the allowance of interest upon the interest coupons, as indicated in said opinion; and the case is remanded for further proceedings in conformity with the opinion of this court. The costs on appeal to be divided equally between the parties.

IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—NOS. 9845, 9846 Filed October 9, 1945

Before Hicks, Simons and Martin, Circuit Judges.

Martin, Circuit Judge. The background of the present appeals need not be elaborated, for the reason that the historical setting has been fully revealed in *Columbia Gas & Electric Corp.* v. *United States*, this day decided. A brief resume should suffice.

The Inland Gas Corporation is a subsidiary of its parent holding company, the American Fuel & Power Company, which owned substantially all its stock as well as the controlling interest in other gas utilities, including the Kentucky Fuel Gas Corporation. By actions thought to be inequitable and in violation of the Anti-Trust Laws of the United States, the Columbia Gas & Electric Corporation, [fol. 377] a huge natural gas utility, attempted to destroy the threatened competition of the American Fuel & Power Company system. In consequence of this effort, Columbia had acquired, by early December, 1930, nearly forty per cent of the $4,400,000 first mortgage bond issue of the Inland corporation and slightly more than forty per cent of the $4,000,000 first mortgage bond issue of the Kentucky Gas Corporation. Columbia had also acquired more than seventy per cent of the stock of the American Fuel & Power Company and a substantial amount of the debenture bonds of both its subsidiaries, Inland and Kentucky.

Columbia instigated an equity receivership for both Inland and Kentucky; and, later, a foreclosure bill was filed by the trustee for the first mortgage bondholders of Inland. A petition for sequestration of the latter's income for their benefit was filed simultaneously. The district court extended the equity receivership and sequestered the income of Inland, as prayed. On October 15, 1935, a

representative committee filed, on behalf of some of the first mortgage bondholders, a petition for the reorganization of the Inland Gas Corporation in the same district court, that for the Eastern District of Kentucky. Shortly thereafter, the district court approved the petition for reorganization.

On February 4, 1939, the district court confirmed the sale of the physical assets of the Kentucky Fuel Gas Corporation to Inland for a consideration of $151,192.48. The Trustee for the debtor, Inland, served in like capacity for the debtor, Kentucky Fuel Gas Corporation.

In the reorganization proceeding pertaining to the debtor, Inland Gas Corporation, a petition was filed on November 3, 1943, by a committee, known as the Van Horn Committee, formed for the protection of the first mortgage bondholders of the debtor. Setting up that the trustee of the debtor corporation had on hand securities and cash in excess of two and a half million dollars, and that the item of cash was amply sufficient for the debtor's working capital, and asserting the first lien of the first mortgage bondholders on the assets, the petition prayed for a partial [fol. 378] distribution of fifty per cent, on account of the amount due on each first mortgage bond. The Vanston Bondholders Protective Committee also represents holders of Inland's six-and-a-half per cent first mortgage sinking fund bonds, and, likewise, as evidenced by its position assumed on this appeal, desires a partial distribution to the first mortgage bondholders.

The Trustee responded to the petition, reported the existing situation, and sought the court's determination of the questions presented. Various responses, petitions and objections were filed by interested parties, including second mortgage bondholders, Carl B. Early and others, and the so-called Green Committee, representing noteholders of the American Fuel & Power Company, and holders of certificates of deposit issued by the Lilienthal Committee for that company's notes; and by Morris Green, as creditor in both the Inland Gas Corporation and the Kentucky Fuel Gas Corporation proceedings.

The district court proceeded to a hearing of the application for distribution upon all the pleadings, and upon the record and proceedings previously had in the three bankruptcy causes, relating respectively to the American

Fuel & Power Company, the Kentucky Fuel Gas Corporation, and the Inland Gas Corporation. After receiving evidence, hearing arguments, and considering briefs filed by the contending parties, the district court entered an order and judgment which embraced findings of fact and conclusions of law; but no opinion was filed.

These findings of fact were as follows:

"I. No intervening liens were perfected on any of the assets of the Inland Gas Corporation between the time of the appointment of the equity receiver of the said company and the appointment of the Trustee in Bankruptcy of said Company.

"II. The Mortgage or Deed of Trust, dated February 1, 1928, between the Inland Gas Corporation and the Chatham-Phoenix National Bank and Trust Company and James F. McNamara, Trustees, securing the Inland Gas Corporation First Mortgage 6½% Sinking Fund Gold Bonds, Series A, due February 1, 1938, by the terms thereof [fol. 379] gave said Bondholders a first lien on the assets of the Inland Gas Corporation described in said Mortgage or Deed of Trust; and in addition thereto a first lien on all after acquired property and the net earnings from the conduct of the business of Inland Gas Corporation.

"III. The cash on hand and securities held by Ben Williamson, Jr., as Trustee of the Inland Gas Corporation, were acquired and accumulated through the operation by the equity receiver of the Inland Gas Corporation and by Ben Williamson, Jr., as Trustee of the Inland Gas Corporation and by his predecessor Trustee, (a) Through the operation of the gas properties which were owned by Inland Gas Corporation prior to the time of the appointment of the equity receiver of said Corporation, all of which property was subject to the first lien of the Mortgage or Deed of Trust hereinabove referred to. (b) Through the operation of the gas properties which were subsequently acquired by the equity receiver or the Trustee in Bankruptcy of said Inland Gas Corporation, pursuant to appropriate orders of this Court, and all of which properties were paid for with funds of the estate which otherwise would have been held for the benefit of the First Mortgage Bondholders of the Inland Gas Corporation. (c) Through the purchase of gas which was not produced from property owned or leased

by the Inland Gas Corporation or the equity receiver of said Corporation or the Trustee in Bankruptcy of said Corporation, but which gas was paid for out of the funds which otherwise would have been held, subject to the orders of this Court, for the benefit of said First Mortgage Bondholders of Inland Gas Corporation and which gas was marketed and sold by the equity receiver or Trustee in Bankruptcy of said Corporation by the use of funds, property, and facilities of the estate owned and held by Inland Gas Corporation or the Trustee in Bankruptcy of said Corporation."

Upon these findings of fact, the district court, without citation of authorities, adjudged "the law applicable to [fol. 380] the respective issues." This adjudication was in the form of conclusions of law.

The first conclusion stated that the terms and provisions of the mortgage "gave to the holders of the Inland Gas Corporation First Mortgage 6½% Sinking Fund Gold Bonds, Series A due February 1, 1938, a first lien to secure the payment of said Bonds and the coupons attached thereto and interest thereon on all of the property of the Inland Gas Corporation described therein and on all after acquired property and net earnings of the Inland Gas Corporation, of the equity receiver, and of the Trustee in Bankruptcy of said Corporation."

The court's second conclusion declared that the first mortgage bondholders have a first lien on the properties acquired by the equity receiver and by the trustee in bankruptcy of the Inland Corporation, "which properties were acquired pursuant to appropriate orders of this court and paid for out of the funds which otherwise would have been applicable to the payment of said First Mortgage Bonds and coupons and interest thereon."

The third conclusion of law was thus stated: "The net earnings derived by the Trustee in Bankruptcy of said Inland Gas Corporation and by the equity receiver of said Corporation from the operation of the properties owned by the Inland Gas Corporation, including property acquired subsequently by said receiver and by said Trustee in Bankruptcy and further including the net income from the purchase and sale of gas by the receiver and by said Trustee, is subject to the lien of said Mortgage or Deed of Trust; and that said funds, subject to the orders of this Court, are held by the Trustee in Bankruptcy of said Corporation

for the benefit of said holders of the said First Mortgage Bonds and Coupons until said Bonds, coupons, and all interest thereon are paid in full."

The fourth conclusion stated was that the first mortgage bonds and the coupons thereto attached bear simple interest at the rate provided in the mortgage, or deed of trust, from the respective due dates of the bonds and of the coupons until paid.

A further conclusion was thus stated: "Neither the de-[fol. 381]benture holders nor the general claimants have any right, based either upon subrogation or upon any other ground or basis, to participate in or share with the First Mortgage Bondholders in the distribution of the income or assets of the Inland Gas Corporation until the holders of the said First Mortgage Bonds and coupons attached thereto shall have been paid in full, including any and all accrued and unpaid interest on said coupons and on said bonds."

Restating in part the earlier adjudication, the eighth conclusion of law directed that the Trustee should hold the property, cash and securities, pursuant to the orders of the court, for the payment of the first mortgage bonds and the coupons thereto attached, and interest thereon, until the bonds, coupons and interest shall have been paid in full.

The other three numbered conclusions of law consisted of reservations of judgment on certain questions not here involved; directions for formal procedure; and the taking under advisement of the application of the Van Horn Committee for further distribution to the first mortgage bondholders, "and the probable effect thereof upon ultimately working out a plan of reorganization."

Both the Green Committee, in its protective capacity, and Early and others, as owners of Inland's ten-year seven per cent debentures, seasonably perfected their appeals, and have appropriately stated the points relied upon.

1. The first question presented is: Was the district court correct in holding that the non-negotiated coupons attached to the first mortgage bonds of the Inland Gas Corporation bear simple interest, at the rate provided in the mortgage, *from the respective due dates of the coupons until paid?*

To answer this question, we must first ascertain from what source we should seek controlling jurisprudence.

The deed of trust, securing the Inland first mortgage bonds, was executed in the State of New York. The bonds and the interest coupons thereto attached were also executed and issued in that state; and were payable there, at [fol. 382] the office of the indenture trustee, or, at the option of the bearer, in Illinois. There is no evidence of record that any bondholder demanded payment in Illinois. Nor do the proofs of claim filed by the bondholders indicate that any coupons have been detached from the bonds or negotiated to third parties.

Neither the bonds nor the coupons provide for the payment of interest on the coupons after maturity and default in payment; but the trust indenture securing them does provide for the payment of interest on defaulted *coupons*, as well as bonds, from their respective due dates until paid, at the same interest rate as that applicable to the bonds before maturity.

New York is the state where the contracts were made and is also the primary place of performance. In all the circumstances, it would seem, therefore, that we must look to the law of New York for decisive guidance. The issue was tried and determined in the district court upon this hypothesis, though the question is not free from doubt.

The rule long recognized was thus stated in *Scudder* v. *Union National Bank*, 91 U. S. 406, 412, 413: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought." The Supreme Court in *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 453, said that it had "often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view."

The opinion in *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496, 497, announced that, under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the federal courts, when deciding

[fol. 383] questions of conflict of laws, *in diversity of citizenship cases*, must follow the rules prevailing in the states in which they sit.[1]

But, in *D'Oench Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447, 456, the Supreme Court expressly pretermitted the question of whether the rule of the *Klaxon* case applies where federal jurisdiction is not based on diversity of citizenship. The instant case rests on no such jurisdiction, but upon the jurisdiction of the federal district court sitting in bankruptcy, in a reorganization proceeding, in the State of Kentucky.

In *Huddleston* v. *Dwyer*, 322 U. S. 232, 236, 237, the duty of a federal appellate court, as well as that of a United States District Court, to ascertain and apply controlling state law was emphasized to the point that the judgment of the circuit court of appeals was reversed, and the cause remanded for reconsideration, in the light of decisions of the Supreme Court of Oklahoma, which had re-examined its earlier decisions, including some upon which the circuit court of appeals had relied in deciding the case. In *Meredith* v. *Winter Haven*, 320 U. S. 228, 237, 238, the Chief Justice declared that the Supreme Court "has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain." The opinion stated further that, even though the Supreme Court's decisions "could not finally settle the questions of state law involved, they did adjudicate the rights of the parties with the aid of such light as was

[1] It seems clear that, under Kentucky law, simple interest is allowable upon non-negotiated coupons from their respective due dates until paid. See *McWilliams* v. *Northwestern Mut. Life Ins. Co.*, 285 Ky. 192, 197, and cases there cited. See also *Pensacola & Atlantic R. Co.* v. *Hilton's Trustee*, 147 Ky. 553, 556. Both the Illinois rule and the federal rule are to the same effect. *Bowman* v. *Neeley*, 137 Ill. 433; same case, 151 Ill. 37; *Abbott* v. *Stone*, 172 Ill. 634; *Town of Genoa* v. *Woodruff*, 92 U. S. 502. See also federal authorities cited in opinion of Judge Mack in *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 11 F. Supp. 418, 420.

afforded by the materials for decision at hand, and in ac-
[fol. 384] cordance with the applicable principles for determining state law."

The Court of Appeals of Kentucky has declared that "it may be stated without exception that if under the *lex loci contractus* the contract for any reason is void, it will be invalid everywhere, and will not be enforced by the *lex fori*, although it would be valid if executed in that jurisdiction." *Moody* v. *Barker*, 188 Ky. 401, 403, Cf. *Fry* v. *Theobold*, 205 Ky. 146, 148, 149; *Cooper's Adm'r* v. *Lebus' Adm'rs*, 262 Ky. 245, 250. So, in any event, if the covenant to pay interest on interest is invalid under New York law, it would seem that a Kentucky state court would not enforce the covenant and that, therefore, a federal district court sitting in Kentucky should not enforce it.

With these principles in mind, we approach the difficult task of attempting, as in duty bound, to evolve from the confusing status of New York law the rule of decision to be derived from the authorities in that state upon the issue presented for determination.

Though the district judge filed no opinion, it appears from his colloquy with counsel, contained in the record, that he placed chief dependence upon an opinion by District Judge Patterson in *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 26 F. Supp. 954 (S. D. New York), for his conclusion that the unnegotiated coupons attached to the Inland first mortgage bonds carry interest from their maturity dates until paid. The opinion of this distinguished New York federal jurist, then a United States District Judge for the Southern District of New York and later promoted to the Circuit Court of Appeals for the Second Circuit, is entitled to high respect, especially upon an interpretation of New York law.

But it must be observed that the authority of Judge Patterson's opinion is weakened, because of its seeming conflict with the opinions on the same subject matter of two other distinguished federal jurists, namely: Judge Mack of the Second Circuit Court of Appeals, sitting as district judge in *American Brake Shoe & Foundry Co.* v. *Interborough* [fol. 385] *Rapid Transit Co.*, 11 F. Supp. 418 (S. D. New York); and Judge Lurton, a former member of this court and later an associate Justice of the Supreme Court, who wrote the opinion in *Columbus, S. & H. R. Co. Appeals*, 109 Fed. 177 (C. C. A. 6).

Judge Patterson held that, under New York law, the provision of a trust indenture for seven per cent interest on interest coupons, after maturity, was enforceable as not in violation of the public policy of the State of New York. He drew a distinction between compounding interest by adding accumulated interest to the principal at periodic intervals and an agreement to pay simple interest on overdue instalments of interest; and concluded that statements in certain of the New York opinions, to the effect that an agreement to pay "interest on interest" is invalid, were made in contexts where the agreements under discussion were agreements to pay compound interest. He distinguished *Williamsburgh Savings Bank* v. *Town of Solon*, 136 N. Y. 465, upon the ground that, in that case, there was no promise by the borrower to pay interest on overdue coupons, and that the Court of Appeals of New York had held merely that the law would not add such a promise, or such a consequence, except where the coupon had been detached and was held by one who did not hold the bond. He declared, further, that it appears that the New York courts have not rendered a decision on the validity of a covenant by a borrowing corporation to pay simple interest on overdue coupons. He regarded it as significant that, "by the impressive weight of authority in other jurisdictions overdue coupons are held to draw interest as matter of law, without the assistance of express agreement to that effect by the debtor." He added that it should be borne in mind that, in general, parties may make what contracts they please, and that the law enforces a contract as written, unless contrary to statute, or to settled public policy. *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 26 F. Supp. 954.

Circuit Judge Mack, sitting previously as a district judge in the same case, had reached a contrary conclusion in [fol. 386] *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 11 F. Supp. 418, 419, 420, *supra*, as to the validity and effect of the same covenant construed by Judge Patterson. In his opinion, Judge Mack asserted: "But, under New York law, the indenture provision for interest after maturity on the other two classes of interest coupons is unenforceable, as violative of the public policy of that state. *Williamsburgh Savings Bank* v. *Town of Solon*, 136 N. Y. 465, 32 N. E. 1058 (1893); *Bailey* v. *County of*

Buchanan, 113 N. Y. 297, 22 N. E. 155, 6 L. R. A. 562 (1889); *Young* v. *Hill*, 67 N. Y. 162, 23 Am. Rep. 99 (1876)." Despite his expressed individual view that state law ought to control contractual obligations made and payable in the state, especially in cases resting on diversity of citizenship, Judge Mack was constrained by the doctrine of *Swift* v. *Tyson*, 16 Pet. 1, to apply federal common law then thought to exist; and, therefore, held that the holders of the coupons were entitled to interest on them from maturity.

In the interim between the decision of Judge Mack and that of Judge Patterson, the opinion in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, was promulgated by the Supreme Court; and, consequently, Judge Patterson was called upon to decide whether further payments of interest on the delinquent coupons should be made. It is obvious that, had Judge Mack's opinion been rendered after the announcement of the revolutionary doctrine of *Erie R. Co.* v. *Tompkins*, he would have applied the New York law and disallowed interest on the past-due coupons.

In *Columbus, S. & H. R. Co. Appeals*, 109 Fed. 177, 193 (C. C. A. 6), *supra*, Judge Lurton said: "The decree of the Circuit Court allowed interest upon the undetached matured coupons. This is excepted to upon the ground that the principal and interest is made payable in New York. The doctrine of the New York courts seems to be that interest upon interest is not allowed under the law of that state, but that an exception exists growing out of the character and purpose of interest coupons upon commercial obligations 'when they become separate and independent instruments.' [fol. 387] In *Williamsburgh Sav. Bank* v. *Town of Solon*, 136 N. Y. 465, 32 N. E. 1058 (decided in 1893), it was held that, until they do, this exception from the general rule has no application." *Bailey* v. *Buchanan Co.*, 115 N. Y. 297, 22 N. E. 155, 6 L. R. A. 562, was also cited.

Judge Clancy of the Southern District of New York, in *Transbel Inv. Co.* v. *Roth*, 36 Fed. Supp. 396, 398, 399, pointed out that the instructions of Chancellor Kent to the master in chancery, in *Connecticut* v. *Jackson*, 1 Johns. Ch. N. Y., 13, 7 Am. Dec. 471, forbade the imposition of simple interest on interest, and also that the same eminent jurist, in *Van Benschooten* v. *Lawson*, 6 Johns. Ch., N. Y., 313, 10 Am. Dec. 333, had under consideration the imposition of interest on interest, although it was designated "compound interest." Judge Clancy said: "It appears

though that the rule has been consistently stated as a public policy, that interest on interest has been described as compound interest because it differs from compound interest not in character or quality but only in quantity and that no case in New York has whittled the policy down one jot or tittle." He thought however, that *Williamsburgh Savings Bank* v. *Town of Solon, supra,* pertaining to the payment of interest on coupons of bonds of a large issue generally distributed, "constitutes an exception in the sense that the policy does not there apply." From our reading of the *Williamsburgh* case, we cannot concur in this differentiation; but regard the reasoning of Judge Clancy's opinion as otherwise sound.

The *Williamsburgh* case presented the question whether interest could be collected on past due interest coupons, where there was no covenant in the trust indenture securing the bonds, or on the face of either the bonds or the coupons, that interest would be payable on the coupons after maturity. The Court of Appeals of New York adhered to the doctrine of *Bailey* v. *Buchanan County,* 115 N. Y. 297, 22 N. E. 155, and disallowed interest on the coupons upon the principle that they cannot be considered independent negotiable instruments entitled to draw interest from maturity, *unless the coupons have been detached from the* [fol. 388] *bonds and separately negotiated.* Unless so detached and negotiated, the coupons were considered as falling within the rule pertaining to ordinary unpaid interest instalments.

Considering the New York decisions in their historical setting and relationship, it would seem that, in New York, a covenant made prior to the accrual of interest, to pay interest on interest, is contrary to the public policy of the state and is, therefore, unenforceable. Though the opinions usually speak of "Compound interest," no intentional distinction between "compound interest" in a technical sense and simple "interest upon interest" is apparent. The bar against the allowance of interest upon interest, unless agreed upon after the interest has become due and payable, seems to rest upon disapproval of a hard and oppressive exaction tending to usury, without reference to difference in degree. Indeed, some of the New York decisions, listed below, dealt with agreements to pay simple interest on interest. In our study, we have considered the New York cases chronologically: *State of Connecticut* v.

Jackson, 1 Johns. Ch. 13; *Van Benschooten* v. *Lawson*, 6 Johns. Ch. 313; *Mowry* v. *Bishop*, 5 Paige's Ch. 98; *Toll* v. *Hiller*, 11 Paige's Ch. 228; *Forman* v. *Forman*, 17 Howard's Practice Rep. 255; *Stewart* v. *Petrie*, 55 N. Y. 621; *Young* v. *Hill*, 67 N. Y. 162; *Bailey* v. *Buchanan County*, *supra*; *Williamsburgh Savings Bank* v. *Town of Solon*, *supra*.

Two statements of Mr. Justice Cardozo are important. In *Continental Securities Co.* v. *New York Central & H. Railroad Co.*, 217 N. Y. 119, 125, 111 N. E. 484, 486, the brilliant New York jurist declared: "It makes no difference that the promise to pay interest is represented by coupons. Until detached and separately negotiated, a coupon is merely an incident of the bond without greater force than any other promise for the payment of interest (*Williamsburgh Savings Bank* v. *Town of Solon*, 136 N. Y. 465, 481)." He asserted, in *Newburger-Morris Co.* v. *Talcott*, 219 N. Y. 505, 510: "The charge of compound interest was correctly disallowed. The rule is settled that a promise to pay interest upon interest is void if made [fol. 389] at a time before simple interest has accrued (*Young* v. *Hill*, 67 N. Y. 162). The provision in the contract that interest shall be 'charged on the account current . . . at the rate of 6 per cent per annum,' must, therefore, mean simple interest. Any other promise, made at the outset of the dealings, would be invalid." These expressions of one of New York's greatest judges fix our conviction that the New York law forbids the allowance of interest on the defaulted coupons in the instant case.

We find nothing to the contrary in *Union Estates Co.* v. *Adlon Construction Co.*, 221 N. Y. 183. No agreement to pay interest upon interest was involved in that case. The holding there was that an agreement by a corporation to pay interest in excess of the legal rate is not usurious under New York law; and that, in the absence of an interdicting statute, an agreement to pay interest upon a loan from its date until its payment, at one rate before and a different rate after its maturity, is an agreement to pay interest and not a penalty as to the latter rate. The case is not analogous to that at bar.

In pursuance of the duty resting upon us, we have, in conformity with *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, and *Fidelity Trust Co.* v. *Field*, 311 U. S. 169, looked to the opinions of the intermediate

courts of New York, to all other data supplied by counsel for the contending parties in the form of references to masters' reports and orders of confirmation of the same, and to all available sources, for the determination of the New York law upon the point in issue. The most that has been developed from such investigation is conflict. We have found no guidance to decision save in the opinions of the highest court of New York. Upon our rounded view of the opinions of that tribunal, we have concluded that the district court erred in holding that the non-negotiated coupons attached to the first mortgage bonds of the Inland Gas Corporation bear simple interest, at the rate provided in the mortgage, from the respective due dates of the coupons until paid.

[fol. 390] 2. Can the rejected claim of Columbia Gas & Electric Corporation to ownership of more than a third of the first mortgage bonds issued by Inland Gas Corporation (which claim was rejected as invalid because based on or arising out of illegal transactions and, therefore, not provable or allowable in a bankruptcy reorganization) be deemed valid as an asset of the Trustee of Inland for the benefit of all creditors, including debenture holders, so as to permit them to share in the security of the first mortgage?

The district court answered in the negative; and we think the answer is correct.

It has now been held in the companion case, *Columbia Gas & Electric Corp.* v. *U. S.*, *supra*, that in deference to the principle announced in *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, the claim of Columbia Gas & Electric Corporation, based upon its ownership of mortgage bonds issued by Inland, is not to be rejected but is to be subordinated to the claims of other creditors in the same category. While in view of the liabilities of Inland in relation to its assets, the distinction between rejection and subordination may be purely academic, it becomes necessary to consider the foregoing contention, in view of possible further insistence upon it, notwithstanding the amendment to the Columbia decree, and in consideration of the possibility that our amendment may, upon certiorari, be set aside, and the decree therein, rejecting Columbia's claim, restored.

The argument of appellants lacks clarity, and is difficult to follow. From the rejection by the district court

of any and all claims of Columbia in these reorganization proceedings, appellants take the position that the rejected claim of Columbia passes to the Trustee of Inland, for the benefit of all creditors.

They contend that a fraudulent mortgage, or preferential lien, voided in bankruptcy proceedings is held by the trustee for the benefit of all creditors, both antecedent and subsequent; and that, "where there are other secured creditors, the voided obligation or transfer will be preserved for the benefit of all creditors, both secured [fol. 391] and unsecured, who are to share equally as a result of the avoidance of the claim." The cases which they cite do not establish any such proposition as remotely applicable to the case at bar. *First National Bank* v. *Staake*, 202 U. S. 141; *In re Graves' Estate*, 27 F. Supp. 717 (W. D. Ky.); *Egyptian Supply Co.* v. *Boyd*, 117 F. (2d) 608 (C. C. A. 6); *Campbell* v. *Calcasieu Nat. Bank*, 12 F. (2d) 981 (C. C. A. 5); *Stellwagen* v. *Clum*, 245 U. S. 605; L. A. Becker Co. v. Gill, 206 Fed. 36 (C. C. A. 8); *Globe Bank* v. *Martin*, 236 U. S. 288; *Campbell* v. *Dalbey*, 23 F. (2d) 229 (C. C. A. 5); *Oliver* v. *Brennan*, 292 Fed. 197; *In re Hurst*, 194 Fed. 830 (C. C. A. 4); *In re Duggan*, 183 Fed. 405 (C. C. A. 5). These authorities are so far afield from the situation confronted here that to discuss and differentiate them would serve no useful purpose.

Appellants seek to buttress their position upon Sections 67 and 70 of the Bankruptcy Act; and contend that interpretative decisions hold that title to property recovered by a trustee in bankruptcy, where a claim has been rejected for a violation of law or a lien has been annulled, passes to the trustee in bankruptcy for the benefit of all creditors. *Prudence Corp.* v. *Geist*, 316 U. S. 89; *Moore* v. *Bay*, 284 U. S. 4; *Campbell* v. *Dalbey, supra; Fazackerly* v. *E. Kahn's Sons Co.*, 75 F. (2d) 110 (C. C. A. 5); *Egyptian Supply Co.* v. *Boyd, supra; In re L. H. Lewis Co.*, 62 F. (2d) 353 (C. C. A. 5); *In re New York Economical Printing Co.*, 110 Fed. 514 (C. C. A. 2). None of these authorities is in point; and we agree heartily with the comment of the district judge, made during colloquy with counsel, that it is impossible to find anything in *Prudence Corp.* v. *Geist, supra;* heavily emphasized by appellants, that has any application to the question presented.

The rejected lien of Columbia was a mortgage lien created by contract, and not a lien obtained by attachment,

judgment, levy, or other legal or equitable process, or proceedings, pursuant to Section 67.

Section 70 of the Bankruptcy Act gives the trustee the right to attack a transfer made or an obligation incurred by [fol. 392] a debtor adjudged bankrupt under the Act, if any one creditor may make such attack; and the recovery of the property transferred, or the cancellation of the obligation incurred, will be for the benefit of all creditors. That which passes to the trustee under Section 70 is the right of the creditor to attack the transfer or obligation. It does not follow, from this, that the trustee would, from the right granted by the Section, be subrogated to participate, in lieu of Columbia, in the security of the mortgage, upon adjudication of the invalidity of the bonds held by Columbia. If any right of subrogation exists here at all, it must be derived from general doctrine and not from the Bankruptcy Act. Certainly, there is nothing in Section 70 to indicate that the bonded indebtedness of the debtor to Columbia must or can be kept alive for the benefit of the creditors of the debtor, after cancellation as to Columbia.

Nor does there seem to be any justifiable basis for application of the "doctrine of substitution," or subrogation, for the benefit of the general creditors or debenture holders in the instant case. So far as the record shows, the bondholders who yet hold valid first mortgage bonds have done nothing to the detriment of the holders of junior liens, or of general creditors. See *Martin* v. *Commercial Nat. Bank of Macon, Ga.*, 228 Fed. 651, 654 (C. C. A. 5). Appellants are claiming the right to subrogation without any showing that they actually have sustained or will sustain loss from the rejection of Columbia's claim. The assets of the bankruptcy estate have been neither increased nor diminished by that rejection. The status quo of the assets of the debtor remains unchanged. It is true that the liabilities of the estate have been reduced, but not at the expense of general creditors.

Where a part of a secured debt is valid and a part invalid, no good reason appears for permitting other creditors to share in the security. Indeed, the contrary has been held in cases where the equities of the mortgagees appeared weaker than do those of the holders of the valid Inland first mortgage bonds. See *Edgar* v. *Ames*, 255 Fed. 835 (C. C. A. 8); [fol. 393] *Bell & Coggeshall Co.* v. *Kentucky Glass Works Co.*, 106 Ky. 107. See also *In re McDermott*, 115 F. (2d)

582 (C. C. A. 7); *Cass Bank & Trust Co.* v. *Sheehan*, 97 F. (2d) 935 (C. C. A. 8). Cf. *City National Bank of Greenville* v. *Bruce*, 109 Fed. 69 (C. C. A. 4).

The contention of appellants that the decision of the district court gives an added security not within the terms of the trust indenture to the first mortgage bondholders is unsound, for it rests necessarily upon an erroneous assumption that the bondholders were in the position of co-owners. The mortgage covers the entire parcel of mortgaged property and each bond is secured ratably by the entire mortgaged property.

There is no power vested in a bankruptcy court to order preferential payments because of considerations which might appeal to the Referee or to the Judge as falling within general principles of equity jurisprudence. The plain mandate of law cannot be so set aside. While the bankruptcy court is a court of equity it is restricted in its application of equitable principles to the jurisdiction conferred upon it by the provisions of the National Bankruptcy Act, reasonably construed. See statement in *Southern Bell Telephone and Telegraph Co.* v. *Caldwell*, 67 F. (2d) 802 (C. C. A. 8). We find no justification here present for applying the doctrine of subrogation.

3. The last issues presented for decision are whether, as was held by the district court, the lien of the first mortgage of Inland Gas Corporation embraces (1) income earned before the bill to foreclose the mortgage was filed on April 15, 1931; (2) cash, receivables and supplies on hand at the time of the appointment of the Equity Receiver on December 2, 1930; and (3) after acquired property and the income from after acquired property. The appellants challenge the correctness of the judgment of the district court in these three particulars. They contend that, under the reservation clause of the trust indenture securing the first mortgage bonds, cash on hand, receivables and other personal [fol. 394] property assets generally describable as supplies were free and clear from the lien of the mortgage *until such time as default should be declared*, and that inasmuch as default was not declared until some four months after the Equity Receiver had taken possession, the mortgage bondholders are not entitled to a lien on these excepted assets.

The doctrine of *Benedict* v. *Ratner*, 268 U. S. 353, 364, is said to support their argument that reservation of full

control by the mortgagor of the excepted assets, until default is declared, prevented the effective creation of a lien.

It seems well settled that the validity and effect of a mortgage lien should be determined by the law of the state in which the property upon which the lien is asserted is located. See *Rubenstein* v. *Nourse*, 70 F. (2d) 482, 484 (C. C. A. 8), and cases there cited; *Manufacturers Bank & Trust Co.* v. *Lauchli*, 118 F. (2d) 607 (C. C. A. 8); *Humphrey* v. *Tatman*, 198 U. S. 91; *Holt* v. *Crucible Steel Co.*, 224 U. S. 262. The opinion in *Marshall* v. *New York*, 254 U. S. 380, 385, states that "a receiver appointed by a federal court takes property subject to all liens, priorities or privileges existing or accruing under the laws of the State." We must therefore look to Kentucky for the controlling law.

It would appear that in Kentucky, no lien in favor of third parties having come into existence prior to the time the mortgagee sought to subject to the mortgage accrued rents, issues and profits, the mortgage constituted a first lien on the rents, issues and profits accrued or on hand with the mortgagor at the time of the institution of the foreclosure proceeding and the entry of the order of sequestration or. April 15, 1931. *Watt's Administrator* v. *Smith*, 250 Ky. 617, 630, 631.

In Kentucky, it has been declared that the entire tenor and effect of an instrument pledging rents, issues and profits in addition to the real estate mortgaged is that such a pledge is deemed secondary security, "with the lien continuing as an inchoate right which will be and must be perfected or consummated by asserting the right by some defi- [fol. 395] nite action looking toward possession and subjection." Such definite action must be taken in some lawful manner, which ordinarily, even without a specific provision authorizing it, is by asking the court to have a receiver take control for the pledgee's benefit. Where there is a pledge of rents, issues and profits, "the mortgage or lien will be construed to cover those things on hand when they are taken into possession by the mortgagee or the receiver"; but of course "up until the time the mortgagee has chosen to exercise his right to perfect his lien on the rents, issues, and profits, any intervening lien acquired upon them must take precedence and be held superior." *Southern Trust Co.* v. *First-City Bank, etc.*, 259 Ky. 151, 154, 155.

The most recent pertinent opinion of the Court of Appeals of Kentucky is *Title Ins. & Trust Co.* v. *Clark*, 271

Ky. 22, 29. In that case, Clark had mortgaged real estate and the rents, issues and profits arising from the mortgaged property. Subsequently, he executed an assignment of all his property, including the mortgaged real estate, for the benefit of creditors. Taking charge of the mortgaged real estate, the assignee collected the rents, issues and profits therefrom. Thereafter, the mortgagee commenced foreclosure proceedings and procured the appointment of a receiver for the mortgaged property. It was held that the accrued rents, issues and profits were subject to the lien of the mortgage. The lien of the mortgage was regarded as "first and superior to any lien or rights in equity or otherwise, that the general creditors may have on account of the assignment."

Insofar as title and substantive rights are affected, no material difference appears between the position of an assignee under a deed of assignment for the benefit of creditors and an equity receiver of the property and assets of a corporation. See *Banco Kentucky Co.'s Receiver* v. *National Bank of Kentucky's Receiver*, 281 Ky. 784, 823, 825.

The appointment of a receiver does not change title or impose any lien upon the property in possession of the [fol. 396] receiver. As was said by Judge Lurton in *Central Appalachian Co.* v. *Buchanan*, 90 Fed. 454, 458 (C. C. A. 6): "He [the receiver] is a mere custodian of the court, holding and protecting the property to await its ultimate disposition by the court, according as the right might appear. No right of priority is ordinarily fixed by such appointment. It cuts off the right to acquire liens, but imposes none by virtue of the step alone." See also *Quincy, etc., Railroad Co.* v. *Humphreys*, 145 U. S. 82; *Haehnlen* v. *Drayton*, 192 Fed. 300 (C. C. A. 3); *Southern Ry. Co.* v. *United States Fidelity & Guaranty Co.*, 87 F. (2d) 118 (C. C. A. 5); *Thomas* v. *Circinnati, N. O. & T. P. Ry. Co.*, 91 Fed. 202, 204 (opinion by Circuit Judge Taft, later Chief Justice of the United States).

In our view, the appointment of the equity receiver on December 2, 1930, did not foreclose the mortgagee from taking such action, after that date, as was necessary to subject the accrued rents, issues and profits to the lien of the mortgage. Nor did the appointment of the receiver have the effect of creating an intervening lien upon the current assets of the mortgagor. The institution of foreclosure proceedings by the mortgagee on April 15, 1931, following the ap-

pointment of the receiver, who had taken possession of the assets several months earlier, and the entry of the sequestration order effectuated perfection of the inchoate lien of the mortgagee upon all rents, issues and profits accrued or on hand at the time; and the lien, being so perfected, related back to the date of the execution of the mortgage. Such interpretation does not contravene the accepted rule that, after the appointment of a receiver, creditors possessing no lien may not acquire one and thereby obtain a preference. See *Thompson* v. *Fairbanks*, 196 U. S. 516, 524, 525; *Humphrey* v. *Tatman*, 198 U. S. 91; *Fisher* v. *Zollinger*, 149 Fed. 54 (C. C. A. 6).

When mortgage assets are brought into the custody of a court of equity, for distribution, the right of the mortgagee to the rents, issues and profits therefrom, both as to those accrued and those subsequently accruing, is superior to the claims of unsecured creditors, or of [fol. 397] those who have not perfected liens prior to the institution of the receivership. These conclusions, we think, are well supported by authority. *Watt's Administrator* v. *Smith*, 250 Ky. 617; *Title Ins. & Trust Co.* v. *Clark*, 271 Ky. 22; *In re Wakey*, 50 F. (2d) 869, 872 (C. C. A. 7). Judge Evans said, in the last cited case: "Assuming as we do that the trustee in bankruptcy occupies the same position as a receiver appointed in a suit in equity, where no directions appear as to the disposition of the rents and profits, there seems no escape from the conclusion that payments out of such funds should be made to the lienholders in the order of their priority." In *Atlantic Trust Co.* v. *Dana*, 128 Fed. 209, 230, Mr. Justice Van Devanter, then Circuit Judge, said that in the circumstances of the case the reconstruction, enlargement, or permanent improvement of mortgaged property by a court's receiver "does not any more displace or postpone the prior mortgage lien than would the like act of the mortgagor in the absence of a receivership."

We think the district court correctly adjudged the priority of the lien of the Inland first mortgage for the reasons heretofore stated.

There remains for consideration the question whether the lien of the Inland Gas Corporation's first mortgage covers after acquired property and the income from after acquired property. In our judgment the district court correctly decided that it does. The rule in Kentucky is thus stated in *U. S. C. I. P. & F. Co.* v. *Henry Vogt M. Co.*, 182

Ky. 473, 482: "The rule, which applies to property described in a mortgage, which the mortgagor did not then have, but, which is to be afterward acquired by him, is, that the mortgage does not create a lien upon such property, except as between the parties to it, when it comes into existence, except in the instance of the increase of a female animal covered by a mortgage and where property is acquired by a corporation, when undertaking to exercise powers, which are conferred upon it by its charter. [Citing case.] . . . In the case of public service corporations, as railroad [fol. 398] companies and water companies, property acquired after the execution of a mortgage which is sufficiently descriptive to embrace the after acquired property, and which composes an integral, indispensable or necessary part of its machinery or fixtures, to perform things, which it is empowered by its articles of incorporation to do, are covered by the lien of the mortgage, not only as between the mortgagor and mortgagee, but, as between the mortgagee and subsequent purchasers and claimants of liens. [Citing cases.]"

See also *Georgetown Water Co.* v. *Fidelity Trust & Safety Vault Co.*, 117 Ky. 325, 341, 342; *Cheatham* v. *Tennell's Assignee*, 170 Ky. 429, 432; *Moulder Holcomb Co.* v. *Glasgow Cooperage Co.*, 173 Ky. 519, 524; *Northwestern Mutual Life Insurance Co.* v. *Stofer*, 242 Ky. 144, 146.

The mortgage debtor, being a public utility corporation, falls within the exception from the general rule as declared in the Kentucky cases cited *supra*. The property acquired from the use of mortgaged funds on hand at the date of the receivership is covered by the lien of the mortgage. By the express provisions of the indenture securing the mortgage bonds, title was conveyed to the indenture trustee to after acquired property and to all rents, issues, privileges, revenues and income, present and future, of such property. All leases and property acquired in fee were purchased from earnings of the property subject to the mortgage lien. Such earnings were subject to the mortgage lien under the rents, issues and profits clause.

We find nothing in the authorities cited by appellants on this phase of the case to gainsay the conclusions reached by the district judge. The opinion in *Nash* v. *Onondaga Hotel Corporation*, 140 F. (2d) 209 (C. C. A. 2), turned upon the construction of the law of New York; and the opinion of

District Judge Nevin in the *National Cottonseed Products Corporation* reorganization case, 34 F. Supp. 438 (W. D. Tenn.) relating to an after acquired property clause in a mortgage, turned on the application of federal law. We find the position of appellants is not supported by *Miller Supply* [fols. 399-400] *Co.* v. *Louisa Water Co.'s Assignee*, 128 Ky. 476.

The judgment of the district court, from which these appeals were taken, is affirmed in all respects which we have indicated, and is reversed with respect to the allowance of interest upon the interest coupons, as heretofore indicated; and the cause is remanded to the district court for further proceedings in conformity with this opinion.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER EXTENDING TIME—Filed November 5, 1945

Having been duly considered, and good cause appearing therein, the petition of the Vanston Committee for Inland Gas Corporation and Kentucky Fuel Gas Corporation First Mortgage Bonds for an extension of twenty days' time for filing a petition for rehearing in the above styled causes is allowed, as prayed.

[fol. 401] UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, OCTOBER TERM, 1944

(Argued February 19, 1945. Decided October 9, 1945)

Nos. 9845, 9846

In the Matter of AMERICAN FUEL & POWER COMPANY, Inland Gas Corporation, Kentucky Fuel Gas Corporation, Debtors

LOUIS A. GREEN, and ROBERT HEILBRUNN, Known as The Green Committee, and Morris Green, Appellants,

v.

VANSTON [illegible] PROTECTIVE COMMITTEE, LILIENTHAL PR[illegible] Van Horn Committee, Appellees

CARL B. [illegible] DANIEL MATTHEWS, JACK PATTON, and P. G. MEADOW, Appellants,

v.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE, VAN HORN COMMITTEE, Lilienthal Protective Committee, Appellees

PETITION FOR REHEARING—Filed November 14, 1945

[fol. 402] Your petitioner the Vanston Committee for Inland Gas Corporation and Kentucky Fuel Gas Corporation First Mortgage Bonds respectfully petitions this Court for a rehearing and for further oral argument in this case with respect to the question of interest on the overdue coupons of Inland Gas Corporation First Mortgage Bonds. The Court in its opinion disallowed interest on these coupons. In so doing, as we read the opinion, the Court first determined that the law of New York governed, relying upon language from *Scudder* vs. *Union National Bank*, 91 U. S. 406. This was followed by a quotation from *Liverpool Steam Co.* vs. *Phenix Ins. Co.*, 129 U. S. 397, reading as follows:

> "• • • often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity and their interpretation by the law of the place where they were made, *unless the contracting*

parties clearly appear to have had some other law in view." (p. 453) (Italics ours.)

Then referring to *Erie* vs. *Tompkins*, 304 U. S. 64, and after citing several cases on page 7, the opinion mentions (p. 8) that the Court of Appeals of Kentucky has, in conflict of law cases, held that the law of the place of the making of the contract governs. We respectfully submit that the Court is under a misapprehension as to what law governs. We hope to show, should rehearing be granted, that the New York law does not govern either (1) by reason of *Erie R. Co.* vs. *Tompkins*, 304 U. S. 64, or (2) on the theory of *lex loci contractus* and also (3) that, in so far as New York law has any bearing, it favors interest on interest in this case.

Discussion

(1) We believe the cases of *Klaxon Co.* vs. *Stentor Co.*, 313 U. S. 487; and *D'Oench, Duhme & Co.*, vs. *F. D. I. C.*, [fol. 403] 315 U. S. 447, cited on page 7 of the opinion, demonstrate that *Erie* vs. *Tompkins* does not apply to other than diversity of citizenship cases. Furthermore, we do not see how, under our Federal System, federal statutes of national scope, such as the Bankruptcy Act (including Chapter X), could be administered if one doctrine were to apply in the federal courts located in one state because of the law of that state and another doctrine were to apply in a neighboring state because of the differing laws of that state. The Act is a national one based on the bankruptcy clause of the Constitution. *Continental Bank* vs. *Rock Island Ry.*, 294 U. S. 648. This phase is further discussed under (2) *infra*.

2. We next pass to the question of the bearing in this case of the doctrine of *lex loci contractus*. Once we recognize that bankruptcy is a matter of federal law and once we admit the theory of *lex loci contractus* may be recognized "unless the contracting parties clearly appear to have had some other law in view," *Liverpool Steam Co.* vs. *Phenix Ins. Co., supra*, we are in a dilemma. Without entering into extensive argument at this time, we may say we believe it is apparent the contracting parties here must have had other than New York law in view in that the coupons were payable both in New York and Illinois, the mortgage was made at a time when the United States courts

were enforcing as part of the federal common law interest on overdue interest coupons. If a default were to occur every reasonable expectation was that the property would be administered in federal equity receivership. Furthermore the property itself was in Kentucky. Paramount to all of these considerations the contracting parties must have had in mind the power of the Federal government to regulate bankruptcy. Indeed, this Court we believe states the appropriate and applicable federal law in the footnote on page 7 when after stating that under Kentucky law it seems clear that simple interest is allowable upon non-negotiated coupons it adds "both the Illinois rule and the [fol. 404] *federal* rule are to the same effect." (Italics ours.)

On the point that federal law governs we quote but one authority, *Prudence Realization Corp.* vs. *Geist*, 316 U. S. 89. The question there was whether an insolvent defaulting guarantor of certificates of participation in a mortgage, who was also the owner of a part of the mortgage indebtedness, was entitled to share pro rata in a distribution of the proceeds of the mortgage in a § 77B bankruptcy reorganization. The New York decisions had declared he was not so entitled. The United States Supreme Court after stating that nothing in *Erie* vs. *Tompkins* required a court of bankruptcy to apply such a local rule governing the liquidation of insolvent estates, said the Bankruptcy Act prescribes its own criteria for distribution to creditors and in closing its opinion said (p. 97):

> "Since the New York rule, in the absence of an actual agreement to subordinate the guarantor, is merely a general rule of law governing insolvency proceedings, it is not controlling in bankruptcy. And since in the circumstances of the present case we find no agreement and no equitable basis for depriving the Prudence Company and its creditors of the benefits of the usual bankruptcy rule of equality, the judgment below must be reversed."

We hope to prove that every consideration of equity requires the federal court sitting in bankruptcy to adopt the federal rule permitting interest on overdue interest in the circumstances of this case. That was a bargain which the parties made and the circumstances of the bargain should not be disregarded.

(3) We also believe the Court misapprehended the New York law in analyzing the New York cases chronologically. The latest case of the highest court of the State of New [fol. 405] York so considered, *i. e.*, *Williamsburgh Savings Bank* vs. *Town of Solon*, 136 N. Y. 465 (p. 11 of the Opinion) was one in which there was no agreement by the borrower to pay interest on overdue coupons; also there was not as here property in another state with the coupons payable in still another state. We quote the entire discussion of interest on interest in that case:

> "But there is a remaining question open for consideration, and that is the allowance of interest upon the coupons from their date. It results in an award of compound interest which we have held not to be recoverable, except upon some new and independent agreement made upon sufficient consideration. (*Young* v. *Hill*, 67 N. Y. 162.) The inquiry here is, of course, whether the coupons sued come within that exception, and the solution of the problem depends upon their nature. We have already in this court determined what they are and described their character and quality. In *Bailey* v. *County of Buchanan* (115 N. Y. 297) Earl, J., said that while it was true that past due coupons payable to bearer when detached from the bonds are for many purposes separate and independent instruments which may be negotiated and sued upon without the production of the bonds, yet such coupons always have some relation to the bonds; that until negotiated or used in some way they serve no independent purpose; that while they are in the hands of the holder they remain mere incidents of the bonds and have no greater force or effect than the stipulation for the payment of interest contained in the bonds; and that while they continue in such ownership and possession it can make no difference whether they are attached or detached, as they are then mere evidences of the indebtedness for the interest stipulated in the [fol. 406] bonds. I think that adjudication concludes us, and a re-examination of the question in the light of the very full and able discussion in the present case only strengthens the conclusion then reached in which we all concurred. Interest, as a rule, follows the principal without becoming principal, and cannot be

compounded by force merely of the contract; but that general rule has been modified somewhat by an exception growing out of the character and purpose of interest coupons. They may become separate and independent instruments. When they do the exception is for the first time needed and for the first time applies. Until they do the promise is merely to pay interest and is governed by the usual rule. They do not become separate and independent instruments until they are utilized as such. Before that occurs and while they remain in the hands of the holder of the bonds the occasion for the exception has not arisen and the exception does not apply. That is plaintiff's situation. It is true it was prevented from suing by an injunction, but the damages occasioned by it are awarded on its dissolution, and theoretically at least cover all losses thereby sustained.

"It follows therefore that the judgment for the plaintiff was erroneous to the extent of its award of interest upon the coupons and should be modified by deducting therefrom the sum of four thousand two hundred and forty-four dollars and fifty-two cents, and, as modified, be affirmed without costs to either party in this court." (pp. 481-482)

It is to be observed first that the Court said the questioned interest was not recoverable "except upon some new and independent agreement made upon sufficient consideration." The Court then stated that the inquiry before it was whether the coupons came within that exception, [fol. 407] and it said that the solution of the problem depended upon their nature.

There was no agreement to pay interest on the coupons. Why then was it necessary for the Court to consider the nature of the coupons? For if the rule is clear that interest on interest is not recoverable except upon a promise made after default, there was no need for the Court to consider the nature of a coupon since, in the case before it, there was no promise to pay interest on the coupons either after default or at any other time.

We submit that the reason the Court examined into the nature of the coupons was to determine whether an agreement to pay interest on them was present.

The Court pointed out that until coupons are negotiated they have no greater force or effect than the stipulation for the payment of interest contained in the bonds. In other words, as the Court puts it, interest as a rule follows the principal without becoming principal and cannot be compounded by force merely of the contract. That is to say, if the contract to pay interest on the principal says nothing about the payment of interest on defaulted interest, no obligation to make such payment is to be inferred even though the agreement to pay interest is represented by a coupon.

The Court then pointed out, however, that coupons may become separate and independent instruments, *i. e.*, when negotiated, they carry interest after default. Why is this? The letter of the agreement made by the obligor on the bonds is the same whether or not the coupons have been negotiated. Whatever considerations of inequity and oppression may be present are equally applicable whether or not the coupons have been negotiated. What the Court in the *Williamsburgh* case had in mind is indicated by its statement that, until negotiation of the coupons, "the promise is *merely* to pay interest and is governed by the usual rule." (Italics ours.) In other words, there is to be inferred from the expectation of the obligor that the [fol. 408] coupons will be negotiated his promise to pay interest on them after default. There can be no other explanation for the rule that interest is payable on coupons which have been transferred by the holder of the bond.

In short, the Court in the *Williamsburgh* case examined into the nature of the coupon to determine the extent of the obligor's agreement. Nothing else being stated by the obligor, his agreement is "*merely* to pay interest" on the principal of the bond to whoever holds it; his contract goes no further so long as principal and interest are payable to the same person. But the very act of creation of negotiable coupons is a statement of something else, by the obligor, namely, a statement of intention that negotiated coupons are to be separate and independent instruments, from which is to be implied an agreement to pay interest on them in case of default. The entire analysis of the Court rests really on intention and we submit that the reasoning of the Court must lead to the conclusion that, if it had found an express agreement to pay interest on the coupons while they remained in the hands of the

bondholder, it would have required that agreement to be honored. There is nothing in the opinion which indicates the contrary and the use of the word "merely" is significant.

Our interpretation of the Court's opinion gives it internal consistency; a contrary interpretation is in effect to state that there is no rational basis for the rule which allows interest on negotiated coupons.

Respectfully submitted, Milbank, Tweed & Hope, Attorneys for Petitioner Vanston Bondholders Protective Committee.

LeWright Browning, George W. Jaques, of Counsel.

[fols. 409-410] Certificate of Counsel

I, George W. Jaques, a member of the firm of Milbank, Tweed & Hope, attorneys for the Petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Dated, New York, N. Y., November 10, 1945.

George W. Jaques.

[fol. 411] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—Filed November 26, 1945

The petition for rehearing is denied.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 412] Supreme Court of the United States, October Term, 1946

No. 42

Order Allowing Certiorari—Filed March 25, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed and Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 413] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 43

ORDER ALLOWING CERTIORARI—Filed March 25, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed and Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 414] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 44

ORDER ALLOWING CERTIORARI—Filed March 25, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed and Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 415] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 45

ORDER ALLOWING CERTIORARI—Filed March 25, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed and Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 416] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed May 29, 1946

It Is Hereby Stipulated that in printing the record for the use of the Supreme Court of the United States the following portions of the record as printed below (i. e. in the U. S. Circuit Court of Appeals for the Sixth Circuit) shall be omitted:

[fol. 417] I

Page 18, beginning with the seventh line:

"The Marshal having" etc.

to

Page 25, seventh line from the bottom:

"Mr. Bowers: May it please,".

II

Page 29, twelfth line from the bottom:

"Mr. Bowers: I would like to hear" etc.

to

Page 48, third line from bottom:

"MR. APISDORF: Before the Court".

III

Page 49, twentieth line from top:

"Counsel agreed that"; etc.

to

Page 69, fifteenth line from bottom:

"Regarding the Report".

IV

Page 92, twenty-third line from top:

"Senator Bulkley: Well, I don't know", etc.

to

Page 130, twenty-third line from top:

"Re: Whether First Mortgage Bondholders".

V

Page 149, top of page:

"In Re Free Assets."

to

Page 159, second line from bottom:

"Mr. Davis: Judge, there was one matter".

[fol. 418]

VI

Page 198, top of page:

"United States District Court".

to

Page 211, eighth line from top:

"(Signed) H. Church Ford, Judge."

VII

Page 233, top of page:

"District Court of the United States".

to

Page 263, bottom of page:

"United States District Judge."

Dated: May 27, 1946.

——— ———, Counsel for Carl B. Early, et al. Woodward Dawson Hobson & Fulton. A. Shelby Winstead, Counsel for Carl B. Early, et al. Baker Obermeier Rosner & Rosenson, Counsel for Louis A. Green, et al. George W. Jaques, Counsel for Vanston Bondholders Protective Committee. Robert J. Bulkley, Counsel for Vanhorn Bondholders Protective Committee

[fol. 419] [File endorsement omitted.]

Endorsed on cover: File No. 50,551, 50,552, 50,553, 50,554. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 42. Vanston Bondholders Protective Committee, Petitioner, vs. Louis A. Green and Robert Heilbrunn, known in these Proceedings as the Green Committee and Morris Green. Term No. 43. Vanston Bondholders Protective Committee, Petitioner, vs. Carl B. Early, Daniel Matthews, Thomas Matthews, et al. Term No. 44. Vanhorn Bondholders Protective Committee, Petitioner, vs. Louis A. Green and Robert Heilbrunn, known in these Proceedings as the Green Committee and Morris Green. Term No. 45. Vanhorn Bondholders Protective Committee, Petitioner, vs. Carl B. Early, Daniel Matthews, Thomas Matthews, et al. Petitions for writs of certiorari and exhibit thereto. Filed: No. 848 and 849, February 14, 1946; No. 850 and 851, February 15, 1946. Term No. 42 O. T. 1946, 43 O. T. 1946, 44 O. T. 1946, 45 O. T. 1946.

FILE COPY

Office - Supreme Court, U. S.
FEB 14 1946
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1945

No. [redacted] 42

No. [redacted] 43

IN THE MATTER

of

AMERICAN FUEL & POWER COMPANY,
INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
Debtors.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,
against
LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the Green Committee and Morris Green,
Respondents.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,
against
CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON and P. G. MEADOR,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND SUPPORTING BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1945

No.

No.

IN THE MATTER
of
AMERICAN FUEL & POWER COMPANY,
INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
Debtors.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,
against
LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the Green Committee and Morris Green,
Respondents.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,
against
CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON and P. G. MEADOR,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, the Vanston Protective Committee, respectfully shows:

Summary Statement of the Matter Involved

The Circuit Court of Appeals for the Sixth Circuit ruled that overdue coupons on the First Mortgage Bonds of Inland Gas Corporation, a Debtor in proceedings under Chapter X of the Bankruptcy Act, do not bear simple interest, as provided in the Mortgage securing the bonds, from the respective due dates of such coupons. By the terms of the bonds they and the coupons were both payable at the office of the Corporate Trustee in the City of New York, or at the option of the bearer of the bonds or coupons at the office of Continental National Bank & Trust Company in the City of Chicago, State of Illinois (R. 354). Appropriate reference is made in the bonds to the Mortgage for a description of the property mortgaged, the nature and extent of the security and the rights of the bondholders (R. 356). The Mortgage itself provides that upon default the Company shall pay the "total amount then due on principal and interest on all the bonds with interest from the due dates thereof", that the Corporate Trustee may recover judgment therefor and further that any moneys received by the Trustees from the operation or sale of the mortgaged property shall be applied to the payment of the whole amount then due or unpaid upon the bonds "with interest on overdue principal and overdue installments of interest, at the same rates respectively as were borne by the respective bonds" (R. 361-363).

The Indenture was executed in the State of New York by the Debtor, a Delaware corporation, to Chatham-Phenix National Bank and Trust Company and James F. McNamara, Trustees. The principal assets of the Debtor, including the mortgaged property, are located in Kentucky (R. 301). The parent of the Debtor, American Fuel and Power Corporation, was incorporated in Delaware (R. 6). It became a Debtor in 77-B proceedings in that State but these proceedings were later transferred to the District Court in Kentucky (R. 6) and became Chapter X proceedings (R. 346, 348).

Disregarding the State of incorporation of the Debtor and its parent, and looking only (a) to the place of contracting, (b) the two alternative places of performance and (c) the location of the mortgaged property, the transaction in question had substantial contacts with at least three States: New York, Illinois and Kentucky. It is undisputed that under the law both of Illinois and of Kentucky the indenture provision concerning simple interest on overdue coupons is valid. The Circuit Court of Appeals has so held (see opinion in the instant case, footnote 1, R. 383; 151 F. (2d) at 475). Whether the provision is valid under the law of New York, is disputed.

The order of the District Court (R. 348) was made as a consequence of a petition by a First Mortgage Bondholders Committee, requesting a distribution upon the First Mortgage Bonds. The Vanston Committee, the Petitioner herein, also represented First Mortgage Bonds and joined in this application. The Trustee of the Debtor filed a response which raised four questions which the Trustee considered should be decided before any distribution was made. One of these questions related to the interest on overdue interest coupons. The District Court, by FORD, *J.*, had decided that such interest on interest was payable, mainly relying upon the decision of *American Brake Shoe Co.* vs. *Interborough Rapid Transit Co.*, 26 F. Supp. 954 (D. C. S. D. N. Y., 1939, PATTERSON, *J.*), which held such provision valid under New York law.

In reversing the ruling of the District Court and disallowing simple interest on overdue coupons (R. 375, 376), the Circuit Court of Appeals recognized that it was faced with a problem of choice of law and that it could reach the question of the validity of the interest provision only after having ascertained "from what source we should seek controlling jurisprudence". (R. 381; 151 F. (2d), p. 475.)

The Court further recognized and discussed the preliminary question before it, i. e., whether a federal choice of law rule should govern or whether, as in diversity cases the rule should be borrowed from the law of the State of the forum. It stated that this Court had "expressly preter-

mitted the question" of whether the doctrine of *Erie* vs. *Tompkins*, 304 U. S. 64 (1938), applied in a case like the present one (R. 383; 151 F. (2d), p. 475).

The Circuit Court of Appeals nevertheless followed *Erie* vs. *Tompkins*, *supra*, and applied the choice of law rule of the forum State, Kentucky, and under that rule, as understood by the Circuit Court of Appeals, New York law governed the validity of the transaction. It declared that New York law, while difficult to determine, invalidated the interest provision.

The hearing of the District Court for all practical purposes was one to determine the amount of the debt secured by the First Mortgage, the Court having theretofore classified the claims against the bankrupt estate (R. 69-72), and it is conceded that after satisfying prior claims there were sufficient assets in the estate to pay the interest claimed on the First Mortgage Bonds and on the coupons.

Opinions Below

The District Court rendered no opinion but during argument stated the grounds for its decision (R. 148), and thereafter made an order and judgment embodying findings of fact and conclusions of law (R. 348).

The opinion of the Circuit Court of Appeals is reported 151 F. (2d) 470 (1945).

Petitioner presents to this Court, and files herewith, as an exhibit hereto, a duly certified transcript of the printed record in the case as the same appears in the United States Circuit Court of Appeals for the Sixth Circuit. Attached thereto are the proceedings had in that Court, including the Judgments (R. 375, 376, 411) which petitioner seeks to have reviewed insofar as they reversed the judgment of the District Court "with respect to the allowance of interest upon the interest coupons".

Jurisdictional Statement

Jurisdiction to review this case upon writs of certiorari is expressly conferred upon this Court by Judicial Code,

Section 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C. Title 28, Sec. 347), and by Bankruptcy Act, Section 24 (c) as amended (Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 854; U. S. C. Title 11, Sec. 47). A timely petition for rehearing was made to the Circuit Court of Appeals (R. 399, 401) and was denied November 26, 1945 (R. 411).

Questions Presented

1. Whether in determining the rule for the choice of the governing local law concerning the validity of an interest provision in a multi-State contract made by a Debtor in Chapter X Proceedings the bankruptcy court should select the choice of law rule of the forum State.

2. Whether such interest provision is invalid, although it does not violate the public policy of any of the States involved, nor of the United States, and would have been upheld if it had been litigated in the Courts of any of such States.

Reasons Relied on for Granting the Writs

1. The transaction involved in the contract creating the promise for simple interest on overdue coupons was of a multi-State character having substantial and natural contacts with at least three States; Kentucky, New York and Illinois. The Circuit Court of Appeals in choosing the governing law had first to determine which body of law was the proper source for the applicable rule determining such choice and it erroneously held that the law of the State in which the District Court was located determined the choice. This question, whether state law or federal law determines the choice of law in bankruptcy, is of importance and frequently arises. The decisions are confused. *United Construction Company* vs. *Milan*, 124 F. (2d) 670 (C. C. A. 6th, 1942); *Robbins* vs. *Bostian*, 138 F. (2d) 622 (C. C. A. 8th,

1943); *Winkle* vs. *Scott*, 99 F. (2d) 299 (C. C. A. 8th, 1938); *In re Champion Shoe Machinery Co.*, 17 F. Supp. 985 (D. C. E. D. Mo. 1937); *In re Central of Georgia Railway Company*, 58 F. Supp. 807, 811 (D. C. S. D. Ga. 1945) rev'd on other grounds sub. nom. *Liberty Natl. Bk. and Trust Co.* vs. *Bankers Trust Co.*, 150 F. (2d) 453 (C. C. A. 5th, 1945).

The ruling of the Circuit Court of Appeals is based on *Erie* vs. *Tompkins, supra.* This Court, however, has recognized, at least inferentially, the inapplicability of *Erie* vs. *Tompkins, supra,* in bankruptcy cases. See *Sola Electric Co.* vs. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942). Bankruptcy jurisdiction arises from a constitutional source differing from that of diversity jurisdiction.

The Circuit Court of Appeals should have followed the Federal rule as to the choice of the governing law, which rule is that where the transaction has substantial contacts with several states, especially where the contract is made in one state and is to be performed in another, the parties are presumed to have contracted with reference to the law of that state which would uphold the contractual provisions regarding interest. *Seeman* vs. *Philadelphia Warehouse Company*, 274 U. S. 403 (1927). Accordingly, the law of Illinois or of Kentucky should govern, and under either law the interest provision in question would be upheld. See cases cited in the opinion of the Circuit Court of Appeals, Footnote 1, 151 F. (2d), at page 475 (R. 383).

2. The provision struck down by the Circuit Court of Appeals does not violate the public policy of any of the three States involved. This is unquestioned as to Illinois. In Kentucky the provision is valid and the Kentucky choice of law rule, if properly ascertained, does not compel reference to a foreign law which would strike down such provision. *Commonwealth Farm Loan Company* vs. *Caudle*, 203 Ky. 761, 263 S. W. 24, 26 (1924); *Pensacola & A. R. Company* vs. *Hilton's Trustee*, 147 Ky. 553, 144 S. W. 1077 (1912); *William Glenny Glass Company* vs. *Taylor*, 99 Ky. 24, 34 S. W. 711, 712 (1896).

Even aside from Judge PATTERSON's reasoning in *American Brake Shoe and Foundry Co.* vs. *Interborough Rapid Transit Co., supra,* petitioner contends that a New York Court, in view of the multi-State character of the transaction, would have upheld the provision. *Westchester Mortgage Company* vs. *Grand Rapids and Ionia Railroad Company,* 246 N. Y. 194 (1927).

Specification of Errors to be Urged

1. The Circuit Court of Appeals erred in holding that the rule determining the choice of the governing law regarding the validity of an interest provision in a multi-State contract made by a Debtor in Chapter X Bankruptcy Proceedings should be borrowed from the law of the forum State and should not be a Federal rule.

2. The Circuit Court of Appeals erred in invalidating such provision, since

(a) the provision does not violate the public policy of any of the States involved, or of the United States, and (b) the provision would have been upheld if there had been litigation concerning its validity in the Courts of any of the States involved.

Prayer for Writs

Wherefore, your petitioner respectfully prays that writs of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Sixth Circuit commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within causes and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your petitioner may have such other

and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y., February 11, 1946.

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BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

References to the opinion of the court below, the petition to it for rehearing, the grounds for jurisdiction, questions presented as well as a statement of the case, and specification of errors to be urged, are contained in the petition and will not be repeated.

First. In determining the rule for the choice of the governing law concerning the validity of an interest provision in a multi-State contract made by a debtor in Chapter X Bankruptcy proceedings, a Federal Bankruptcy Court should select the Federal choice of law rule and not borrow such rule from the forum State.

The transaction giving rise to the promise in issue is of a multi-State character and has substantial and natural contacts with at least three States, to wit, Kentucky, New York and Illinois. Hence, assuming that the Circuit Court of Appeals was correct in considering the issue one of "local law", the question is *which* of these three States should furnish the applicable rule of "local law".

There is thus presented a problem of choice of law. Before this problem can be successfully approached it is necessary to determine which body of law is the proper source for the applicable rule determining such choice. More concretely, before the Bankruptcy Court can choose between the local law of Kentucky, New York and Illinois, it has to decide whether the choice of law rule should be a Federal rule or a local rule. The Circuit Court of Appeals held that the law of the State wherein the Bankruptcy Court sits is the proper source for the applicable choice of law rule.

It will be shown below under (a) that the question decided by the Circuit Court of Appeals is of substantial importance in the business of Bankruptcy Courts and that the decision in the case at bar adds to the confusion now existing with respect to this question, and under (b) that the decision of the Circuit Court of Appeals is incorrect.

(a) Under modern conditions the cases are legion wherein securities distributed in numerous States by a Debtor in bankruptcy or reorganization, or other multi-State transactions affecting the bankrupt estate, raise "local law" questions transcending the frontiers of a single State. In each case of this kind the Bankruptcy Court must necessarily resolve questions of choice of law. The confusion which prevails in the Circuit Courts and District Courts, concerning the proper source of the choice of law rule in proceedings under the federal Bankruptcy Act, shows the need for authoritative clarification. The Circuit Court of Appeals for the Sixth Circuit seems to adhere to the view that a Federal District Court, sitting as a Bankruptcy Court, should apply the choice of law rule of the State wherein it sits. See the case at bar, and also *United Construction Company* vs. *Milan*, 124 F. (2d) 670 (C. C. A. 6th, 1942). A different view was taken by the Circuit Court of Appeals for the Eighth Circuit in *Robbins* vs. *Bostian*, 138 F. (2d) 622, 625 (C. C. A. 8th, 1943). In that case, the Court cited *Klaxon Co.* vs. *Stentor Electric Manufacturing Co. Inc.*, 313 U. S. 487 (1941) and *United Construction Company* vs. *Milan, supra*, for the principle that a Bankruptcy Court should make its choice of law in accordance with State law; but after having made this statement the Court did not refer to the choice of law rule of Missouri, where the Bankruptcy Court sat, but to that of Nebraska, where the property in question was located, and after considering the Nebraska choice of law rule the Court held that according to that rule Nebraska law was applicable to the transaction. The choice of law rule of the forum was not even discussed.

In contradistinction to the foregoing cases there are several others in which the Courts, mostly without discussing the point, have held that the choice of law rule to be applied by a Bankruptcy Court should be a federal rule. It was so held in *Winkle* vs. *Scott*, 99 F. (2d) 299, 301 (C. C. A. 8th, 1938), certiorari denied,* 306 U. S. 634 (1939), a case

* The petition for certiorari in that case did not raise the choice of law point.

involving the defense of usury in a multi-State transaction. The opinion of the Circuit Court of Appeals in that case was rendered more than six months after the Supreme Court decided *Erie* vs. *Tompkins*, 304 U. S. 64 (1938). Several United States District Courts have held, both before and after *Erie* vs. *Tompkins*, that the choice of law rule in bankruptcy should be a federal rule. See *in re Champion Shoe Machinery Company*, 17 F. Supp. 985, 986 (D. C. E. D. Mo. 1937), and cases cited; *In re Central of Georgia Railway Company*, 58 F. Supp. 807, 811 (D. C. S. D. Ga., 1945) rev'd on other grounds sub. nom. *Liberty Natl. Bk. and Trust Co.* vs. *Bankers Trust Co.*, 150 F. (2d) 453 (C. C. A. 5th, 1945).

The Supreme Court, while calling attention to the problem in two recent opinions, has expressly reserved the question for future determination. *D'Oench, Duhme & Co., Inc.* vs. *Federal Deposit Insurance Corporation*, 315 U. S. 447, 456, 463-4, 465-7, 471-2 (1942); *McKenzie, Trustee in Bankruptcy* vs. *Irving Trust Company*, 323 U. S. 365, 371, Footnote 2 (1945).

(b) The holding of the Circuit Court of Appeals in the instant case, that the law of the State of the forum furnishes the choice of law rule applicable in bankruptcy, is based on the premise that the rule of *Erie* vs. *Tompkins*, *supra*, and *Klaxon Co.* vs. *Stentor*, *supra*, is applicable in non-diversity cases. This premise is demonstrably incorrect. The opinion in *Klaxon Co.* vs. *Stentor*, *supra*, at pp. 494, 497 expressly states that "in diversity cases" the Federal Courts follow the choice of law rule of the forum. Both *Erie* vs. *Tompkins* and *Klaxon* vs. *Stentor* are based on a statute, the Rules of Decision Act (28 U. S. C. Sec. 725) which is not applicable in bankruptcy. That statute, passed long before the first Bankruptcy Act, differs from the latter in its constitutional origin. Although the Bankruptcy Act uses the existing organization of the Federal District Courts, it is nevertheless fundamental that Courts of Bankruptcy as such are separate and distinct

courts and that they "exercise the powers and jurisdiction in bankruptcy proceedings quite separate and distinct from the powers and jurisdiction inhering as District Courts". 3 Hughes, Federal Practice, Section 1425, quoted with approval in *Hanna* vs. *Brictson Manufacturing Company*, 62 F. (2d) 139, 145 (C. C. A. 8th, 1932). The inapplicability of *Erie* vs. *Tompkins* and its derivatives in non-diversity cases, especially in bankruptcy, has been repeatedly emphasized by this Court. See for example; *Sola Electric Co.* vs. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942); *Wragg* vs. *Federal Land Bank*, 317 U. S. 325, 328 (1943).

The specific question, whence comes the choice of law rule for a Bankruptcy Court, must be answered in accordance with the express or implied command of the applicable provisions of the Bankruptcy Act (§§ 63, 67, 70, 200). The Constitution authorizes Congress to establish "uniform laws on the subject of bankruptcy throughout the United States" (Art. I, Sec. 8, cl. 4). This has been held to require geographical uniformity, but not to preclude reference to the law of a State with which the transaction in question has a substantial and natural contact. Thus, as to exemptions, this Court upheld a provision referring to the local rule of the State of the debtor's domicile. *Hanover National Bank* vs. *Moyses*, 186 U. S. 181 (1902). Questions of title or dower may be governed by the law of the State where the property is located. See cases collected in 1 Remington on Bankruptcy, 4th Ed., Sections 2 to 6. But no case has been found where the rights of parties under the Bankruptcy Act were made to depend upon the law of a State not because of any substantial and natural contact with the transaction, but merely because it happened to be the State of the forum.

The Bankruptcy Act does not, and constitutionally cannot, refer in any respect to the substantive law of the forum. In Chapter X proceedings the forum is largely a matter of accident. It may be where the corporation has its principal place of business, or its principal assets, or, if the corporation be a subsidiary, either of these two places as

applied to its parent, which may give a third or fourth choice of forum. See *Sections 128 and 129 of the Bankruptcy Act* (U. S. C. Title 11, Sections 528, 529). In the present case the forum could have been Delaware, which is the State of incorporation of the debtor (R. 301), and also the State in which a 77-B proceeding against the parent, American Fuel and Power, was initially brought; the latter proceeding was later moved from the United States District Court in Delaware to the United States District Court in Kentucky (R. 6, 8).

It follows that had the instant case been moved to or initiated in Delaware, or perhaps some other jurisdiction in which the parent might have had its principal assets, then, under the rule adopted by the Circuit Court of Appeals, a different decision could have followed. If the parent had guaranteed the coupons in question, and the bankruptcy proceeding against it had remained in the Delaware Court, one rule as to interest on interest might have been applied against the parent and another rule in the instant case.

In the area of bankruptcy, in which the Constitution itself imposes a rule of *uniformity*, there is no reason to follow the *conformity* rule of the diversity cases. Uniformity, that is independence of the law of the forum, can be accomplished only by a federal choice of law rule.

In the case at bar the federal choice of law rule leads to a result contrary to that reached by the Circuit Court of Appeals. It has been established by a long line of cases in this Court and in the lower federal Courts that where the contract is made in one State and is to be performed in another, the parties are presumed to have contracted with reference to the law of that State which would uphold the contractual provisions regarding interest. See *Seeman* vs. *Philadelphia Warehouse Company*, 274 U. S. 403 (1927) and cases cited; *Cromwell* vs. *County of Sac*, 96 U. S. 51, 60-62 (1877). Under this federal choice of law rule the transaction in question, being concededly good in Illinois,

would have been sustained.* It would have been sustained also because of its substantial contacts with Kentucky, where the contractual provision is likewise valid. See *Seeman* vs. *Philadelphia Warehouse Company, supra,* at 408.

Second. The interest provision is valid since (a) it does not violate the public policy of any of the States involved, nor of the United States, and (b) the provision would have been upheld had there been litigation concerning its validity in the Courts of any of the States involved.

The decision of the Circuit Court of Appeals strikes down a contractual provision which does not violate the public policy of any of the jurisdictions involved. No federal public policy prohibits a promise of simple interest on overdue coupons. See *Town of Genoa* vs. *Woodruff*, 92 U. S. 502 (1875); *Amy* vs. *Dubuque*, 98 U. S. 470, 473 (1878); *Edwards* vs. *Bates County*, 163 U. S. 269, 272 (1896). Nor does any public policy of either Kentucky or Illinois stand in the way of such promise. See *McWilliams* vs. *Northwestern Mutual Life Insurance Co.*, 285 Ky. 192, 147 S. W. (2d) 79 (1940); *Radford* vs. *Southern Mutual Life Insurance Co.*, 12 Bush 434 (1871); *Kentucky Title Company vs. English*, 20 Ky. L. Rep. 2024, 50 S. W. 968 (1899); *Pensacola & A. R. Co.* vs. *Hilton's Trustee*, 147 Ky. 553, 144 S. W. 1077 (1912); *Bowman* vs. *Neeley*, 137 Ill. 433, 27 N. E. 758 (1891); 151 Ill. 37, 37 N. E. 840 (1894); *Abbott* vs. *Stone*, 172 Ill. 634, 50 N. E. 328 (1898).

As to New York law, the Circuit Court of Appeals concluded that *if the whole bond issue had been an intra-State New York transaction,* the promise to pay the interest on overdue coupons would be against public policy.

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* In the Courts below respondents argued that no Inland coupons had been presented in Illinois, but it should be borne in mind that during all the period when these coupons became due the Company was either in Federal Equity Receivership or in 77-B or Chapter X proceedings (R. 303, 173). Moreover there is no doubt that *under the terms of the contract* (R. 355, 360) Illinois is one of the States in which, at the option of the creditor, payment can be demanded. Under the cases cited above, that is sufficient to make Illinois law applicable.

Although this point is not free from doubt, and has caused the Federal Courts considerable difficulty,* it is submitted that according to the weight of authority and reason the New York rule applicable to intra-State New York transactions upholds a promise to pay simple interest on overdue coupons. See *American Brake Shoe & Foundry Co.* vs. *Interborough Rapid Transit Co.*, 26 F. Supp. 954 (D. C. S. D. N. Y., 1939, PATTERSON, *J.*).

But even if the Circuit Court of Appeals were correct in its conclusion that the intra-State New York rule invalidates such a promise, the result reached in the instant case would still be incorrect. That Court failed to recognize that we are here dealing, not with an intra-State New York transaction, but with a *multi-State* transaction which has substantial and natural contacts with other States where the promised interest would be lawful. In such a case the New York law is clearly to the effect that the parties must be presumed to have contracted with reference to the law of such State as would uphold the transaction, and that such intent is not to be thwarted by the courts. See *Westchester Mortgage Co.* vs. *Grand Rapids and Ionia Railroad Co.*, 246 N. Y. 194 (1927), where Judge LEHMAN approvingly cited *Seeman* vs. *Philadelphia Warehouse Company, supra.* See also *Curtis* vs. *Leavitt*, 15 N. Y. 9, 227 (1857). It follows that the particular promise in issue, which was struck down by the Circuit Court of Appeals as allegedly violating New York law, does not contravene the public policy of New York as declared by the courts of that State, and would have been upheld there. Likewise, if the litigation had been brought in a State court either

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*In the Seaboard Air Line Reorganization (*Guaranty Trust Company* vs. *Seaboard Air Line Railway*, Consolidated Cause in Equity No. 214 and Constituent Causes, D. C. E. D. Va., 1943) and in the Wabash Railway Company Reorganization (*The Chase National Bank* vs. *Wabash Railway, Etc.*, No. 12,099 and Constituent Causes, D. C. E. D. Va., 1941) where the mortgages contained a similar covenant for interest on overdue coupons, the courts followed PATTERSON, *J.*, in holding that such covenants were good under New York law. Contra: *In re Wisconsin Central Railway Company*, 63 F. Supp. 151 (D. C., D. Minn. 1945) (appeal pending).

in Illinois or Kentucky, the transaction would have been upheld as not violative of public policy. As to Illinois this is conceded. As to Kentucky the Circuit Court of Appeals held that a Kentucky State Court would have looked to the New York rule, but this is not so. A Kentucky court would have upheld the transaction by looking either to the Kentucky or the Illinois rule covering interest on interest. *Commonwealth Farm Loan Co.* vs. *Caudle*, 203 Ky. 761, 263 S. W. 24, 26 (1924); *William Glenny Glass Co.* vs. *Taylor*, 99 Ky. 24, 34 S. W. 711, 712 (1896); *Pensacola & A. R. Co.* vs. *Hilton's Trustee*, 147 Ky. 553, 144 S. W. 1077 (1912).

The Circuit Court of Appeals, sitting as a Bankruptcy Court, thus took it upon itself, purportedly in deference to "local law", to strike down a promise which does not violate the public policy of New York, or of any other State concerned, and which would have been upheld in State court litigation in each of the States with which the transaction has any substantial and natural contact.

CONCLUSION

It is respectfully submitted that the petition for writs of certiorari in this case should be granted.

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Supreme Court of the United States

OCTOBER TERM, 1945

No. [redacted] 42

No. [redacted] 43

IN THE MATTER

of

AMERICAN FUEL & POWER COMPANY,
INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
Debtors.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

against

LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the Green Committee and Morris Green,
Respondents.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

against

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON and P. G. MEADOR,
Respondents.

REPLY BRIEF OF PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 848

No. 849

IN THE MATTER
of
AMERICAN FUEL & POWER COMPANY,
INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
Debtors.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

against

LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the Green Committee and Morris Green,
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VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

The main contention in Respondents' briefs seems to be that no real question of choice of law is involved (Early et al. brief p. 6; Green Committee brief pp. 3, 7). This despite the fact that the Circuit Court of Appeals recog-

nized it could reach the question of the validity of the interest provision only after having ascertained "from what source we should seek controlling jurisprudence" (R. 381; 151 F. (2d) p. 475; Petition, p. 3).

Analysis of the instant case is not advanced by the attempt of respondent Green Committee to inject into the discussion diversity cases like *Ruhlin* vs. *New York Life Insurance Company*, 304 U. S. 202 (1937) and *Huddleston* vs. *Dwyer*, 322 U. S. 232 (1943). We submit that diversity cases differ from the instant bankruptcy case in that, as was said by this Court in *Holmberg* vs. *Armbrecht et al.*, decided February 25, 1946,

> "For purposes of diversity suits a Federal court is in effect 'only another court of the state' *Guaranty Trust Company* vs. *York, supra,* at 108."

In bankruptcy, where the jurisdiction of the Federal court is derived from another constitutional source*, the basic rule as to application of State law is different. See *American Surety Company* vs. *Sampsell*, decided February 25, 1946, where this Court said:

> "True, we stated in both *Prudence* opinions that the federal law governing distribution of a bankrupt's estate should be applied with 'appropriate regard for rights acquired under rules of state law'. But the extent to which state law is to be so considered is in the last analysis a matter of federal law."

The Early et al. brief seems to rely largely on a footnote in *Corn Exchange Bank* vs. *Klauder*, 318 U. S. 434, 437 (1942). The transaction there, however, did not have substantial contacts with more than one state, and thus did not raise the issue of the proper source for choice of law rules

* *Duggan et al.* vs. *Sansberry*, decided by this Court March 4, 1946.

in federal bankruptcy proceedings. The transaction in the instant case, on the other hand, aside from its contacts in *New York* and *Illinois*, involves distribution of cash accumulated by the Trustee through the operation of the mortgaged properties located in *Kentucky*. Furthermore, these respondents, by their emphasis on *Klaxon Co.* vs. *Stentor Co.*, 313 U. S. 487 (1941) (brief p. 11), and by their reliance on what they consider to be the Kentucky choice of law rule (brief p. 15), admit that a serious question of choice of law stands at the threshold of the case at bar.

Both respondents argue that there is no evidence of record that any bondholder demanded payment in Illinois. Anticipating this argument, we have pointed out in a footnote on page 14 of our original brief that "during all the period when these coupons became due the Company was either in Federal Equity Receivership or in 77-B or Chapter X proceedings." It is clear that by "these coupons" we meant the coupons involved in this litigation and both respondents have to admit that all of the coupons here involved fell due while the Company was in some kind of insolvency proceedings (Green Committee brief pp. 7, 8; Early et al. brief p. 8). The last semi-annual coupon paid was that due August 1, 1930, and receivership occurred December 2, 1930 (R. 303, 173).

The coupons here involved thus remained uncollected and the holder's right to demand payment in Illinois remained unimpaired. That some earlier coupons appear to have been paid prior to any insolvency proceeding, is immaterial. The record does not show that these earlier coupons were presented in New York, and respondents' attempt, in the face of a clear contractual provision establishing an

optional place of performance in Illinois (R. 354, 355, 360), to eliminate that State as one of those substantially connected with the transaction, finds no support in the record.*

Respondents (especially Early et al. brief p. 7) also argue that since New York is named ahead of Chicago in the contract, New York must be regarded as the sole place of performance for purposes of choice of law. This contention, which is asserted as "axiomatic" and based upon "the general rule", begs the principal question of the case, by simply assuming that under the applicable choice of law rule (which rule?) Illinois and Kentucky are not regarded as substantially connected with the transaction. Thus respondents are merely contending for a particular choice of law rule, while Petitioner is contending for another.

This choice of law question, since it arises in bankruptcy, should be controlled by the federal choice of law rule which was laid down in *Seeman* vs. *Philadelphia Warehouse Company*, 274 U. S. 403 (1927). Respondents seek to eliminate the latter case by pointing out that it was decided prior to *Erie* vs. *Tompkins*, 304 U. S. 64 (1938). Here again they beg the question. The *Seeman* case, which is a choice of law case (as distinguished from the purely local situation in *Corn Exchange Bank* vs. *Klauder, supra*) is still the law unless overruled by the choice of law case of *Klaxon Co.* vs. *Stentor Co.*, 313 U. S. 487 (1941), and

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* Since it was the promisee's option to select the place of performance, Illinois or New York, we fail to see how Section 356 of the *Restatement of the Law of Conflict of Laws* aids respondents. The applicable part of that section reads as follows:

> "(1) When a contract involves a promise to do one thing or another at the option of either party the place of performance is undetermined *until the option is exercised*, and it *then* becomes the place of performing the promise which is chosen by the party having the option." (Italics ours.)

whether the *Klaxon* case is applicable in bankruptcy is the very question presented by the instant case.

To our collection of lower court decisions showing confusion as to the source from which the applicable choice of law rule should be drawn in bankruptcy proceedings, there should be added a recent case from the Ninth Circuit, *Hamaker* vs. *Heffron*, 148 F. (2d) 981, 983, footnote 3 (C. C. A. 9, 1945), where the court, in determining the applicable choice of law rule, was guided by federal authorities. The Ninth Circuit and the Sixth Circuit are thus on opposite sides of the fence, whereas the Eighth Circuit seems to have wavered between the two positions.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 42
No. 43

IN THE MATTER
of
AMERICAN FUEL & POWER COMPANY, INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
Debtors.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner
against
LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the GREEN COMMITTEE and MORRIS GREEN,
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VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
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BRIEF FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 42

No. 43

IN THE MATTER

of

AMERICAN FUEL & POWER COMPANY, INLAND GAS CORPORATION, KENTUCKY FUEL GAS CORPORATION,

Debtors,

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,

Petitioner,

against

LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the GREEN COMMITTEE and MORRIS GREEN,

Respondents.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,

Petitioner,

against

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON and P. G. MEADOR,

Respondents.

BRIEF FOR PETITIONER

Opinions of Courts Below

The District Court rendered no opinion but during argument stated the grounds for its decision (R. 56), and

thereafter made an order and judgment embodying findings of fact and conclusions of law (R. 192).

The opinion of the Circuit Court of Appeals, Sixth Circuit, is reported 151 F. (2d) 470 (1945), and is also reprinted at R. 214 *et seq.*

Jurisdiction

The judgments of the Circuit Court of Appeals which Petitioner seeks to have reviewed were filed on October 9, 1945 (R. 213, 214). A timely petition for re-hearing was made to the Circuit Court of Appeals (R. 234, 235) and was denied November 26, 1945 (R. 241). The petition for writs of certiorari made on behalf of Vanston Bondholders Protective Committee was filed herein on February 14, 1946. The order of this Court granting the writs of certiorari was filed March 25, 1946 (R. 242).

Jurisdiction to review this case upon writs of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; 28 U. S. C., Sec. 347), and by Bankruptcy Act, Sec. 24 (c), as amended (Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 854; 11 U. S. C., Sec. 47).

Statement of Case

The Circuit Court of Appeals, in a proceeding under Chapter X of the Bankruptcy Act, invalidated an express agreement that overdue bond coupons should bear simple interest from their respective due dates.

Inland Gas Corporation, hereafter called the "Debtor", issued to the investing public First Mortgage Bonds which were secured by an Indenture of Mortgage dated February 1, 1928 (R. 197-205). By the express terms of the Indenture, appropriately referred to in the Bonds, the bondholders are entitled to "*interest on* overdue principal and *overdue installments of interest* at the same rates respec-

tively as were borne by the respective bonds" (R. 199, 204).* The validity of this contractual provision (R. 192-197) is the question before the Court.

The transaction involved herein has substantial contacts with several states. The Indenture was executed in the State of *New York* by the Debtor, a Delaware corporation, to Chatham-Phenix National Bank and Trust Company and James F. McNamara, Trustees. By the terms of the Bonds they and the coupons were both payable, at the option of the bearer, either at the office of the corporate trustee in the City of New York or at the office of Continental National Bank & Trust Company in the City of Chicago, State of *Illinois* (R. 197-8, 202). The business and principal assets of the Debtor, including the mortgaged property, are located in *Kentucky* (R. 121, 153, 230). The Debtor's parent, American Fuel & Power Corporation, which is a multi-state holding company (R. 23, 122-3),** was incorporated in Delaware (R. 5). It became a Debtor in 77-B proceedings in that State, but these proceedings, which later became Chapter X proceedings, were transferred to the District Court in Kentucky (R. 5).

It is undisputed that under the law both of Illinois and of Kentucky the Indenture provision concerning simple interest on overdue coupons is valid. The Circuit Court of Appeals has so held (see Opinion in the instant case, footnote 1, R. 220; 151 F. (2d) at 475). Whether the provision is valid under the law of New York, is disputed (see *infra*, Point II).

The District Court held the promise to be valid, and directed that interest be paid on the coupons (R. 56). The Circuit Court of Appeals reversed "with respect to the allowance of interest upon the interest coupons", holding the contractual provision for such interest on the coupons

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* Throughout this brief emphasis is supplied, unless otherwise indicated.

** See Opinion in this case, 151 F. (2d) at 472-3; see also *Columbia Gas and Electric Corp.* vs. *United States*, 151 F. (2d) 461, 463 (C. C. A. 6th, 1945); Moody's Public Utilities, 1944, pp. 1192-4.

to be invalid (R. 213). It is this ruling which Petitioner seeks to have reviewed.

The Circuit Court of Appeals recognized that it was faced with a problem of choice of law and that it could reach the question of the validity of the interest provision only after having ascertained "from what source we should seek controlling jurisprudence" (R. 219; 151 F. (2d) at 475). The Court further recognized that before it could approach this choice of law problem, it had to determine the preliminary question whether a federal choice of law rule should govern in bankruptcy proceedings or whether, as in diversity cases, the rule should be borrowed from the law of the State of the forum. The opinion of the Circuit Court of Appeals states that this Court has "expressly pretermitted the question" of whether the doctrine of *Erie* vs. *Tompkins*, 304 U. S. 64 (1938), applies in a bankruptcy case like the present one (R. 220; 151 F. (2d) at 475).

The Circuit Court of Appeals nevertheless followed *Erie* vs. *Tompkins, supra,* and applied the choice of law rule of the forum State, Kentucky. Under that rule, as understood by the Circuit Court of Appeals, New York law governed the validity of the transaction. The Circuit Court of Appeals further held that New York law, while difficult to determine, invalidated the Indenture provision concerning simple interest upon overdue coupons. Every step in this reasoning of the Circuit Court of Appeals was brought up for review by the petition for writs of certiorari.

The issue arises in a proceeding under the Bankruptcy Act. From 1930 to 1935 the Debtor was in federal equity receivership (R. 154). Since 1935 it has been in a reorganization proceeding in the United States District Court for the Eastern District of Kentucky, first under Section 77-B and later under Chapter X of the Bankruptcy Act, and during this period the property of the Debtor has been in the hands of a Trustee appointed in such proceedings (R. 156 *et seq.*). The last coupon paid was that due August 1, 1930 (R. 154, 70).

It is not disputed that the assets in the hands of the bankruptcy trustee, which are subject to the first lien of the First Mortgage Bonds, are sufficient to satisfy all claims of the holders of these Bonds (R. 56). Through operation of the mortgaged properties the trustee accumulated a substantial amount in cash and government securities (193), and in November, 1943 an application was made to the bankruptcy court on behalf of holders of the First Mortgage Bonds for distribution of part of these liquid assets (R. 166). The Vanston Committee, the Petitioner herein, also representing holders of First Mortgage Bonds (152, 154), joined in that application (R. 215; 151 F. (2d) at 473). In his response to the application the Trustee presented for determination by the bankruptcy court the issue, among others, of the validity of the Debtor's promise to pay simple interest on the interest coupons held by the First Mortgage Bondholders (R. 172). This issue is being litigated by the Vanston Committee and the Van Horn Committee representing First Mortgage Bondholders, against the Green Committee and the Early Committee representing the holders of junior securities. The Vanston Committee is Petitioner in No. 42 and No. 43; the Van Horn Committee is Petitioner in the companion cases No. 44 and No. 45.

Specification of Errors to be Urged

1. The Circuit Court of Appeals erred in holding that the rule determining the choice of the governing law regarding the validity of an interest provision in a multi-state contract made by a Debtor in Chapter X Bankruptcy Proceeding should be borrowed from the law of the forum State and should not be a federal rule.

2. The Circuit Court of Appeals erred in invalidating such provision, since

(a) the provision does not violate the public policy of any of the States involved, or of the United States, and

(b) the provision would have been upheld if there had been litigation concerning its validity in the courts of any of the States involved.

Summary of Argument

1. Since *Erie* vs. *Tompkins, supra,* and its derivatives are not applicable in proceedings under the Bankruptcy Act, a federal rule should govern problems of choice of law arising in such proceedings. In the present case the federal choice of law rule would point to the law of Illinois or Kentucky, and under the law of both these States the Indenture provision concerning interest on overdue coupons is concededly valid.

2. The Indenture provision struck down by the Circuit Court of Appeals does not violate the public policy of the United States or of any of the three States involved.

(a) The Kentucky choice of law rule, if properly ascertained, does not point to New York law.

(b) Even if New York law were held to govern the validity of the interest provision in the Indenture, that provision would be valid.

The Circuit Court of Appeals, sitting as a bankruptcy court, should not have invalidated a multi-state contractual promise which would have been upheld in state court litigation in each of the States with which the transaction has any substantial and normal contact.

POINT I.

In determining the rule for the choice of the governing law concerning the validity of an interest provision in a multi-state contract made by a debtor in Chapter X Bankruptcy Proceedings, a federal bankruptcy court should not borrow such rule from the forum State but should select the federal choice of law rule which points to the law of those jurisdictions where the transaction would be upheld.

Disregarding the State of incorporation of the Debtor and its parent, and looking only (a) to the place of contracting, (b) the two alternative places of performance, and (c) the location of the Debtor's business and of the mortgaged property, we find that the transaction giving rise to the promise in issue had substantial contacts with at least three States: New York, Illinois and Kentucky. Hence, assuming that the Circuit Court of Appeals was correct in considering the issue one of "local law", the question is *which* of these three States should furnish the applicable rule of "local law". There is thus presented a question of *choice of law.*

A. Inapplicability of Erie *v.* Tompkins.

Before the Court can ascertain the correct choice of law rule, it is faced with the preliminary question: Which body of law is the proper *source* for the applicable rule determining such choice? More concretely, before the Bankruptcy Court can choose between the local law of Kentucky, New York and Illinois, it has to decide whether the choice of law rule should be a federal rule or a local rule.

The Circuit Court of Appeals (151 F. (2d) at 475) clearly recognized this issue:

> "The opinion in Klaxon Co. *v.* Stentor Co., 313 U. S. 487, 496, 497, 61 S. Ct. 1020, 85 L. Ed. 1477, announced that, under the doctrine of Erie R. Co. *v.* Tompkins,

304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, the federal courts, when deciding questions of conflict of laws, in diversity of citizenship cases, must follow the rules prevailing in the states in which they sit.

"But, in D'Oench, Duhme & Co. *v.* F. D. I. C., 315 U. S. 447, 456, 62 S. Ct. 676, 86 L. Ed. 956, the Supreme Court expressly pretermitted the question of whether the rule of the Klaxon case applies where federal jurisdiction is not based on diversity of citizenship. The instant case rests on no such jurisdiction, but upon the jurisdiction of the federal district court sitting in bankruptcy, in a reorganization proceeding, in the State of Kentucky."

The Supreme Court again "pretermitted" the problem, and perhaps pointed the way towards its solution, in *McKenzie, Trustee in Bankruptcy* vs. *Irving Trust Company*, 323 U. S. 365, 371, Footnote 2 (1945). The lower federal courts are divided. The Circuit Court of Appeals for the Sixth Circuit adheres to the view that a Federal District Court sitting as a bankruptcy court should apply the choice of law rule of the State wherein it sits. See the case at bar, and also *United Construction Company* vs. *Milan*, 124 F. (2d) 670 (C. C. A. 6th, 1942). The Circuit Court of Appeals for the 8th Circuit has wavered between applying a local choice of law rule in *Robbins* vs. *Bostian*, 138 F. (2d) 622, 625 (C. C. A. 8th, 1943) and applying a federal rule in *Winkle* vs. *Scott*, 99 F. (2d) 299, 301 (C. C. A. 8th, 1938), cert. den.,* 306 U. S. 634 (1939), a case involving the defense of usury in a multi-state transaction. The Circuit Courts of Appeals for the 7th and 9th Circuits and a number of District Courts turned to federal law when they had to solve a choice of law problem in bankruptcy proceedings. See *In Re Chicago, Rock Island & Pacific Railway Company* (*Traphagen* vs. *Fleming*), 155 F. (2d) 889, 893 (C. C. A. 7th, 1946); *Hamaker* vs. *Heffron*,

* The petition for certiorari in that case did not raise the choice of law point.

148 F. (2d) 981, 983, Footnote 3 (C. C. A. 9th, 1945); *In Re Champion Shoe Machinery Company*, 17 F. Supp. 985, 986 (D. C. E. D., Mo., 1937); *In re Central of Georgia Railway Company*, 58 F. Supp. 807, 811 (D. C. S. D., Ga., 1945) reversed on other grounds sub. nom. *Liberty National Bank & Trust Company* vs. *Bankers Trust Company*, 150 F. (2d) 453 (C. C. A. 5th, 1945).

The holding of the Circuit Court of Appeals in the instant case, that the law of the State of the forum furnishes the choice of law rule applicable in bankruptcy, is based on the premise that the rule of *Erie* vs. *Tompkins*, *supra*, and *Klaxon Co.* vs. *Stentor Co.*, *supra*, is applicable in non-diversity cases. This premise is not borne out by the decisions of this Court. The opinion in *Klaxon Co.* vs. *Stentor Co.*, 313 U. S. at 494, 497 contains express limiting language to the effect that "in diversity cases" the federal courts follow the choice of law rule of the forum.

Both *Erie* vs. *Tompkins*, *supra*, and *Klaxon* vs. *Stentor*, *supra*, are based on a statute, the Rules of Decision Act (28 U. S. C. Sec. 725) under the terms of which it has been held that "for purposes of diversity suits a federal court is in effect only another court of the state". See *Holmberg* vs. *Armbrecht*, 66 S. Ct. 582, 583-4 (1946). In bankruptcy the rule is different. Although the Bankruptcy Act uses the existing organization of the Federal District Courts, it is nevertheless fundamental that courts of bankruptcy as such are separate and distinct courts and that they "exercise the powers and jurisdiction in bankruptcy proceedings quite separate and distinct from the powers and jurisdiction inhering as district courts". 3 Hughes, Federal Practice, Section 1425, quoted with approval in *Hanna* vs. *Brictson Manufacturing Company*, 62 F. (2d) 139, 145 (C. C. A. 8th, 1932). We consider a Federal District Court sitting in bankruptcy to be as distinct a tribunal as though it were a separate statutory court dealing only with bankruptcy matters. It is not trammeled by the necessity of relying on diversity jurisdiction.

Bankruptcy jurisdiction and diversity jurisdiction are derived from different constitutional sources (*Duggan* vs. *Sansberry*, 66 S. Ct. 657, 662 (1946)), and serve different ends. It is therefore only natural that the general rule concerning the application of local law which was laid down by this Court for the guidance of bankruptcy courts, is entirely different from the rule prevailing in diversity cases. Nothing decided in *Erie* vs. *Tompkins* "requires a court of bankruptcy, in applying the statutes of the United States governing the liquidation of bankrupts' estates, to adopt local rules of law in determining what claims are provable, or to be allowed, or how the bankrupt's estate is to be distributed among claimants". *Heiser* vs. *Woodruff*, 66 S. Ct. 853, 855-6 (1946).* See also *American Surety Company* vs. *Sampsell*, 66 S. Ct. 571, 573 (1946), where this Court said:

> "True, we stated in both *Prudence* opinions that the federal law governing distribution of a bankrupt's estate should be applied with appropriate regard for rights acquired under rules of state law. But the extent to which state law is to be considered is in the last analysis a matter of federal law."

B. THE PROPER SOURCE FOR CHOICE OF LAW RULES IN BANKRUPTCY PROCEEDINGS.

The specific question, whence comes the choice of law rule for a Bankruptcy Court, must be answered in accordance with the express or implied command of the applicable provisions of the Bankruptcy Act (§§ 63, 67, 70, 200; 11 U. S. C., §§ 103, 107, 110, 600). The Constitution authorizes Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States" (Art. I, Sec. 8,

*Following the quoted language, Chief Justice STONE cited a number of recent cases, including *Sola Electric Co.* vs. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942) and *Wragg* vs. *Federal Land Bank*, 317 U. S. 325, 328 (1943), all of which demonstrate the inapplicability of *Erie* vs. *Tompkins* and its derivatives in non-diversity cases. A similar, and perhaps even more pointed statement than that in the *Heiser* case is to be found in *In Re Pittsburgh Rys. Co.*, 155 F. (2d) 477, 483, footnote 13 (C. C. A. 3rd, 1946).

cl. 4). This has been held to require geographical uniformity, but not to preclude reference to the law of a State with which the transaction in question has a substantial and natural contact. Thus, as to exemptions, this Court upheld a provision referring to the local rule of the State of the debtor's domicile. *Hanover National Bank* vs. *Moyses*, 186 U. S. 181 (1902). Questions of title or dower may be governed by the law of the State where the property is located. See cases collected in 1 *Remington on Bankruptcy*, 4th Ed., Sections 2 to 6. But no case has been found where the rights of parties under the Bankruptcy Act were made to depend upon the law of a State, not because of any substantial and natural contact with the transaction, but merely because it happened to be the State of the forum.

The Bankruptcy Act does not, and constitutionally cannot, refer in any respect to the substantive law of the forum. In Chapter X proceedings the forum is largely a matter of accident. It may be where the corporation has its principal place of business, or its principal assets, or, if the corporation be a subsidiary, either of these two places as applied to its parent, which may give a third or fourth choice of forum. Bankruptcy Act, §§ 128, 129; 11 U. S. C., §§ 528, 529. In the present case the forum could have been Delaware, which is the State of incorporation of the Debtor (R. 152-3), and also the State in which a 77 B proceeding against the parent, American Fuel and Power, was initially brought; the latter proceeding was later moved from the United States District Court in Delaware to the United States District Court in Kentucky (R. 5, 10).

It follows that had the instant case been moved to or initiated in Delaware, or perhaps some other jurisdiction in which the parent might have had its principal assets, then, under the rule adopted by the Circuit Court of Appeals, a different decision could have followed. If the parent had guaranteed the coupons in question, and the bankruptcy proceeding against it had remained in the Delaware Court, one rule as to interest on interest might have been applied against the parent-guarantor and another rule against the principal debtor.

In the area of bankruptcy, in which the Constitution itself imposes a rule of *uniformity*, there is no reason to follow the *conformity* rule of the diversity cases. Uniformity, that is independence of the law of the forum, can be accomplished only by a federal choice of law rule.

C. THE FEDERAL CHOICE OF LAW RULE APPLICABLE TO THE INSTANT CASE.

The parties to the contract before the Court expressly stipulated for simple interest on overdue coupons. They obviously intended this contractual provision to be valid. The federal choice of law rule upholds this intention of the parties. That rule points to the law of Illinois and Kentucky, that is, of those states which concededly uphold the promise. It has been established by a long line of cases in this Court and in the lower federal courts that where a contract is made in one state and is to be performed in another, or where otherwise the contract has genuine contacts with several states, the parties are presumed to have contracted with reference to the law of that state which would uphold the contractual provisions regarding interest: *Seeman* vs. *Philadelphia Warehouse Company*, 274 U. S. 403 (1927) and cases cited; *Cromwell* vs. *County of Sac*, 96 U. S. 51, 60-62 (1877).

Respondents argue that the *Seeman* case, which was decided prior to *Erie* vs. *Tompkins*, should no longer be followed. As authority for this argument respondents rely on a footnote in Mr. Justice JACKSON's opinion in *Corn Exchange Bank* vs. *Klauder*, 318 U. S. 434, 437 (1943); but such reliance is misplaced. The footnote in the *Klauder* case merely states that in deciding a question which is controlled by local law, older federal decisions are no longer to be followed. In the case at bar, however, we deal with an area not affected by *Erie* vs. *Tompkins*, and hence not controlled by local law. In such an area there is no reason whatever for discarding a body of federal precedents clearly in point. See *Clearfield Trust Co.* vs. *United States*, 318 U. S. 363, 367 (1943); *Board of County Commissioners* vs. *United States*, 308 U. S. 343, 349-350

(1939). Indeed, the same member of the Court who wrote the opinion in the *Klauder* case emphasized this important distinction in his concurring opinion in *D'Oench, Duhme & Co., Inc.*, vs. *Federal Deposit Insurance Corporation*, 315 U. S. 447 (1942), where he said at page 469:

> "The federal courts have no *general* common law, as in a sense they have no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the federal government. But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law."

When choice of law problems arise in areas not controlled by *Erie* vs. *Tompkins*, then the applicable choice of law rules are necessarily part of the "federal non-statutory or common law" governing such areas. See *D'Oench, Duhme & Co.* vs. *Federal Deposit Insurance Corporation*, 315 U. S. 447 (1942) at page 472, footnote 10.

Moreover, and apart from its force as a binding precedent, the *Seeman* case still retains its persuasiveness by virtue of the strength of its reasoning which was almost universally accepted by the highest courts throughout the nation.

The *Seeman* case was followed in *Smith* vs. *Western & Southern Life Insurance Co.*, 87 F. (2d) 839, 841 (C. C. A. 5th, 1937); *Brierley* vs. *Commercial Credit Co.*, 43 F. (2d) 724 (D. C., E. D. Pa. 1929), aff'd 43 F. (2d) 730 (C. C. A. 3rd, 1930), cert. den. 282 U. S. 897 (1931); *Armstrong* vs. *Alliance Trust Co.*, 88 F. (2d) 449 (C. C. A. 5th, 1937); *Merchants & Manufacturers Securities Co.* vs. *Johnson*, 69 F. (2d) 940 (C. C. A. 8th, 1934), cert. den. 293 U. S. 569 (1934); *In re Champion Shoe Machinery Co.*, 17 F. Supp. 985, 986 (D. C., E. D. Mo. 1937). The two last-cited cases were receivership and reorganization cases.

Outside of the federal courts the overwhelming weight of judicial and academic authority equally supports the rule that where a contract has substantial contacts (or, as it is sometimes put, a "vital connection") with several states, the validity of an interest stipulation is governed by the law of that state which upholds it. See, for instance, *Coad* vs. *Home Cattle Co.*, 32 Neb. 761, 49 N. W. 757 (1891); *Bigelow* vs. *Burnham*, 83 Iowa 120, 49 N. W. 104 (1891); *United States Savings & Loan Co.* vs. *Shain*, 8 N. Dak. 136, 77 N. W. 1006 (1898); *Midland Savings & Loan Co.* vs. *Henderson*, 47 Okla. 693, 150 Pac. 868 (1915); 2 *Wharton, Conflict of Laws*, 3rd Ed., pages 1190-1, 1209-10; *Goodrich, Handbook of the Conflict of Laws*, 2d Ed. Sec. 108; 2 *Daniel, Negotiable Instruments*, 7th Ed. §§ 1075-6; *Note, Conflict of Laws as to Usury*, 125 A. L. R. 482.* All these authorities make it clear that the place of performance is one of the places having a "vital connection" with the transaction.** The location of the debtor's business, especially if it is in the same state where the property securing the debt is situated, constitutes another "vital connection".† *Green* vs. *Northwestern Trust Co.*, 128 Minn. 30, 150 N. W. 229 (1914); *State* vs. *Rivers*, 206 Minn. 85, 287 N. W. 790 (1939). To the same effect see *Chapman* vs. *Robertson*, 6 Paige 627 (Walworth, Ch., N. Y. 1837); *Arnold* vs. *Potter*, 22 Iowa 194 (1867); *Mott* vs. *Rowland*, 85 Mich. 561, 48 N. W. 638 (1891); *Dugan* vs. *Lewis*, 79 Texas 246, 14 S. W. 1024 (1891); *Armstrong* vs. *Alliance Trust Co., supra.*

It is submitted that under the *Seeman* case and the other authorities cited above, the validity of the contractual provisions concerning simple interest on overdue coupons

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* These authorities are cited merely as examples. Each of these cases, text books and articles in turn refers to numerous other authorities supporting the *Seeman* rule.

** Apart from being one of the places of performance, Chicago had other "vital connections" with the transaction. See *infra*, p. 16, footnote.

† In the *Seeman* case at 408, Mr. Justice STONE substituted for "vital connection" the words "normal relation". It is submitted that the difference is one of phraseology only.

should be judged by the law of Illinois or Kentucky, since the transaction has vital connections with these States, and since under the law of both States the provision can be upheld.

D. Illinois and Kentucky Contacts of the Instant Transaction.

Respondents contend, in spite of the express recognition of the choice of law problem by the Circuit Court of Appeals, that the instant case involves no real question of choice of law.*

They argue that Illinois, since it is merely an alternative place of performance, is not one of the States with which the transaction has a substantial contact. There is a twofold answer to this:

(a) Even if Illinois were eliminated as one of the States having a substantial contact with the transaction, the case would still involve a real choice of law problem. The Debtor's business and principal assets, including the mortgaged property, are located in Kentucky. There is thus no doubt that the latter State is substantially connected with the transaction (see cases cited *supra*, page 14). Respondents' contention that the transaction is referable to only one State, New York, is therefore untenable even if the two alternative places of performance are completely disregarded.

(b) By the terms of the Bonds and the coupons, the Debtor promised to pay at the principal office of the Chatham-Phenix National Bank and Trust Company in New York City, or *at the option of the bearer* at the principal office of the Continental National Bank and Trust Company in Chicago, Illinois (R. 197, 198,

* See p. 6, Response of Early Committee to petitions for writs of certiorari, and p. 5, Response of Green Committee. This contention is curiously inconsistent with respondents' other argument that the case is controlled by *Klaxon* vs. *Stentor*, *supra*, which is unquestionably a choice of law case. See p. 11, Early Committee Response and p. 5, Green Committee Response.

202).* Respondents argue that since New York is thus named ahead of Chicago, New York must be regarded as the sole place of performance for purposes of choice of law, there being no evidence that any bondholder demanded payment at Chicago. The record shows that during the whole period when the coupons involved in this litigation successively fell due, the Debtor was either in federal equity receivership or in proceedings under the Bankruptcy Act (R. 154, 70). The coupons thus remained uncollected and the holder's right to demand payment in Illinois remained unimpaired. That some earlier coupons appear to have been paid prior to any insolvency proceeding, is immaterial. The record does not even show where these earlier coupons were presented. As to the coupons involved herein, the creditors have not yet exercised their option to choose between New York and Chicago as places of payment. Until they do, both places remain substantially connected with the transaction. See *Restatement of the Law of Conflict of Laws*, Section 356.

Moreover, by asserting that of the two places of performance named in the contract, only New York is important for purposes of choice of law, respondents beg one of the principal questions of the case; they simply assume that under the applicable choice of law rule (which rule?) Illinois is not regarded as substantially connected with the transaction. Thus, respondents are merely contending for a particular choice of law rule, while Petitioner (*supra*, pp. 12-14) is contending for another.

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* The Continental National Bank and Trust Co. of Chicago was also designated as an agent for and place of registry of the Bonds (R. 200) and Chicago was designated as a situs for notification by publication of the Debtor's exercise of its right of redemption (R. 199).

POINT II.

The contractual provision for simple interest on overdue interest coupons is valid since it does not violate the public policy of any of the states involved, nor of the United States, and the provision would have been upheld had there been litigation concerning its validity in the courts of any of the states involved.

The decision of the Circuit Court of Appeals strikes down a contractual provision which does not violate the public policy of any of the jurisdictions involved.

No federal public policy prohibits a promise of simple interest on overdue coupons. See *Town of Genoa* vs. *Woodruff*, 92 U. S. 502 (1875); *Amy* vs. *Dubuque*, 98 U. S. 470, 473 (1878); *Edwards* vs. *Bates County*, 163 U. S. 269, 272 (1896). Cf. also *Sexton* vs. *Dreyfus*, 219 U. S. 339, 346 (1911); *Codar* vs. *Arts*, 213 U. S. 223, 245 (1909); *Ticonic Nat. Bank* vs. *Sprague*, 303 U. S. 406, 412-13 (1938).

Nor, concededly, does any public policy of either Kentucky or Illinois stand in the way of such promise. See *McWilliams* vs. *Northwestern Mutual Life Insurance Co.*, 285 Ky. 192, 147 S. W. (2d) 79 (1941); *Radford* vs. *Southern Mutual Life Insurance Co.*, 12 Bush 434 (1876); *Kentucky Title Company* vs. *English*, 20 Ky. L. Rep. 2024, 50 S. W. 968 (1899); *Pensacola & A. R. Co.* vs. *Hilton's Trustee*, 147 Ky. 553, 144 S. W. 1077 (1912); *Bowman* vs. *Neeley*, 137 Ill. 433, 27 N. E. 758 (1891); 151 Ill. 37, 37 N. E. 840 (1894); *Abbott* vs. *Stone*, 172 Ill. 634, 50 N. E. 328 (1898).*

The Circuit Court of Appeals nevertheless invalidated the promise, on the ground that the Kentucky choice of law rule points to New York, and that under New York law the promise is void. As we have demonstrated in

* The law of Delaware, where the Debtor was incorporated and could have been sued in the absence of bankruptcy, likewise upholds the promise. *Central National Bank* vs. *Bateman & Co. Inc.*, 15 Del. Ch. 31, 131 Atl. 202 (1925).

Point I, this reasoning, based as it is on the application of a local choice of law rule in a bankruptcy proceeding, involves a fundamentally faulty approach. But even assuming, for the sake of the argument, that the Circuit Court of Appeals was correct in treating the choice of law problem as if this were a diversity case, the result reached by that court would be incorrect because (1) the Kentucky choice of law rule, if properly ascertained, does not point to New York law, and (2) New York law does not invalidate the instant promise.

(1) The Circuit Court of Appeals, in seeking to ascertain the applicable Kentucky choice of law rule, quoted (R. 221) a dictum of the Court of Appeals of Kentucky to the effect that "it may be stated without exception that, if under the lex loci contractus the contract for any reason is void, it will be invalid everywhere, and will not be enforced by the lex fori, although it would be valid if executed in that jurisdiction." This dictum is quoted from the opinion in *Moody* vs. *Barker*, 188 Ky. 401, 222 S. W. 89 (1920), a case dealing with the capacity of a married woman to subject her property to execution for debts of her husband. The authorities cited in support of this dictum make it clear that the Kentucky Court did not intend to create a particular Kentucky rule, but attempted to follow the "general rules" as stated, for example, in *Wharton's Conflict of Laws*. The same "general rule" prevails in the federal courts* and in the majority of other jurisdictions; but it has not prevented this Court and the overwhelming majority of state courts from adopting a special, and different, rule as to the validity of interest provisions in multi-state contracts. See *Seeman* vs. *Philadelphia Warehouse Co.*, 274 U. S. 403 (1927); 2 *Wharton, Conflict of Laws*, 3rd Ed., pp. 1190-1, 1209-10, and the numerous other authorities cited *supra*, pp. 13-14.

It follows that a statement of the "general" Kentucky choice of law rule concerning the validity of contracts is

* *Scudder* vs. *Union National Bank*, 91 U. S. 406 (1875).

not a sufficient answer to the question presented by the instant case. The Circuit Court of Appeals should have pursued the more specific inquiry whether with respect to the validity of *interest* provisions the Kentucky rule differs from the almost universally accepted *Seeman* rule. This inquiry would have led to the conclusion that where a contract has *bona fide* contacts with several States, the Kentucky courts will uphold its interest provisions if such provisions are valid under the law of one of the States involved. *Commonwealth Farm Loan Co.* vs. *Caudle*, 203 Ky. 761, 263 S. W. 24, 26 (1924); *William Glenny Glass Co.* vs. *Taylor*, 99 Ky. 24, 34 S. W. 711, 712 (1896); *Pensacola & A. R. Co.* vs. *Hilton's Trustee*, 147 Ky. 553, 144 S. W. 1077 (1912). The qualification contained in these decisions, that the actual or presumed intention of the parties will be disregarded if aimed at evasion, is immaterial in the case at bar. As was said by Mr. Justice STONE in *Seeman* vs. *Philadelphia Warehouse Company*, *supra*, at 408:

> "A qualification of these rules, as sometimes stated, is that the parties must act in good faith, and that the form of the transaction must not 'disguise its real character.' [Citation]. As thus stated, the qualification, if taken too literally, would destroy the rules themselves for they obviously are to be invoked only to save the contract from the operation of the usury laws of the one jurisdiction or the other. The effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties' entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject." (274 U. S.)

The First Mortgage Bonds involved herein clearly have a "normal relation" not only to New York, but also to Kentucky and Illinois.* It is therefore a fair inference from the Kentucky cases that a Kentucky court, if faced with the choice of law problem at hand, would have judged the

* See pp. 3, 14, *supra*, and footnote, p. 16, *supra*.

validity of the promise in question by the law of Illinois or Kentucky, and thus would have upheld the promise.

(2) Even if New York law were applicable, the result reached by the Circuit Court of Appeals would not be justified. That Court erred in two respects.

(a) The Circuit Court of Appeals erred in seeking only the New York rule which would be applicable if the bond issue had been a strictly *intra-state* New York transaction. That Court overlooked the fact that we are here dealing with a *multi-state* transaction which has substantial and natural contacts with other States where the promised interest would be lawful. In such a case the New York law is clearly to the effect that the parties must be presumed to have contracted with reference to the law of such State as would uphold the transaction, and that such intent is not to be thwarted by the courts. See *Westchester Mortgage Co.* vs. *Grand Rapids & Ionia Railroad Co.*, 246 N. Y. 194 (1927), where Judge LEHMAN approvingly cited the *Seeman* case. See also *Curtis* vs. *Leavitt*, 15 N. Y. 9, 227 (1857)*, and *Chapman* vs. *Robertson*, 6 Paige 627 (1837), where Chancellor WALWORTH upheld a contract usurious at the place of making and at the place of performance, on the ground that it was good at the place where the security for the debt was located. These New York cases, which embody the New York rule applicable to multi-state transactions, were completely overlooked by the court below.

It is not infrequent that a court of State X, after having determined that a particular transaction is governed by the law of State Y, encounters the difficulty that the law of Y has two different rules and applies one or the other, depending upon whether the transaction is of an intra-state or multi-state character. It stands to reason that where the transaction is clearly a multi-state one, the courts of the forum-State X will follow the rule which the

* That our interpretation of *Curtis* vs. *Leavitt*, which was challenged by the respondents, is the correct one, is borne out by *Miller* vs. *Tiffany*, 1 Wall. 298, 310, footnote (1863).

courts of Y have developed for multi-state transactions. See *Guernsey* vs. *Imperial Bank of Canada*, 188 Fed. 300, 301 (C. C. A. 8th, 1911; unanimous opinion by SANBORN, *J.*, concurred in by VAN DEVANTER, *J.*). Hence, if this litigation had taken place before a state court in Kentucky or Illinois, such court would not have overlooked the *Westchester Mortgage* case and the other above-cited New York cases which make it clear beyond any doubt that at least in a multi-state situation no public policy of the State of New York invalidates a promise to pay simple interest on overdue coupons.

(b) Even the purely intra-state New York cases do not support the view of the Circuit Court of Appeals regarding the New York rule. The same New York cases which are relied on by the Circuit Court of Appeals in the instant case, were analyzed by Judge PATTERSON in *American Brake Shoe & Foundry Co.* vs. *Interborough Rapid Transit Co.*, 26 F. Supp. 954, 955-6 (D. C., S. D. N. Y., 1939). We could not put the matter more clearly and more concisely than it was put by Judge PATTERSON, and for this reason we take the liberty of quoting the following part of his opinion:

> "In New York an agreement at the time of a loan to pay compound interest is void. It is said that such agreements, while not usurious, are 'a temptation to negligence on the part of the creditor and a snare to the debtor, and prove in the end oppressive, and even ruinous.' Young *v.* Hill, 67 N. Y. 162, 168, 23 Am. Rep. 99. 'Interest upon interest, promptly and incessantly accruing, would, as a general rule, become harsh and oppressive. Debt would accumulate with a rapidity beyond all ordinary calculation and endurance. Common business cannot sustain such overwhelming accumulation. It would also tend to inflame the avarice, and harden the heart of the creditor.' Connecticut *v.* Jackson, 1 Johns. Ch. 13, 17, 7 Am. Dec. 471. See also Newburger-Morris Co. *v.* Talcott, 219 N. Y. 505, 114 N. E. 846, 3 A. L. R. 287. Compounding interest is the adding of accumulated inter-

est to the principal at periodic intervals. An agreement to pay simple interest on an overdue installment of interest is different. Computations show it to be far less onerous on the debtor. The distinction was noted in Young *v.* Hill, supra, where the court said (page 174): 'An agreement to pay simple interest upon the several instalments of interest as they became due * * * might not be unreasonable or inequitable'. The same distinction between compound interest and simple interest on overdue interest installments has been recognized elsewhere. Parker *v.* McGinty, 77 Colo. 458, 239 P. 10; Bledsoe *v.* Nixon, 69 N. C. 89, 12 Am. Rep. 642. Vaughan *v.* Kennan, 38 Ark. 114; Morgan *v.* Mortgage Discount Co., 100 Fla. 124, 129 So. 589; note in 27 A. L. R. 81. While general statements may be found in New York cases to the effect that an agreement to pay 'interest on interest' is invalid, the fact is that the agreements under discussion were agreements to pay compound interest. In my opinion the cases dealing with agreements for compound interest do not touch the present case.

"Williamsburgh Savings Bank *v.* Solon, 136 N. Y. 465, 32 N. E. 1058, was relied on at argument as an authority against the allowance of interest on overdue coupons. In that case there was no promise by the borrower to pay interest on overdue coupons. The court merely held that the law would not add such a promise or such a consequence, except where the coupon had been detached and was held by one who did not hold the bond. The distinction dependent on who holds the coupon is a curious one and has not escaped criticism by text writers. But in any event the opinion in the Williamsburgh case does not suggest that a covenant to pay interest on overdue coupons would not be countenanced. The fact that even without a covenant interest is allowed on a dishonored coupon in the hands of a person who does not have the bond must mean that there is no public policy in New York against a covenant of the kind involved here.

"It thus appears that the New York courts have not rendered a decision on the validity of a covenant

by a borrowing corporation to pay simple interest on overdue coupons. The argument for invalidity rests on the cases dealing with agreements for compound interest. But the reasons that led the New York courts long ago to condemn agreements for compound interest have only a remote bearing on agreements for simple interest on overdue coupons. On the other hand there are strong reasons for concluding that a covenant to pay simple interest on overdue coupons is valid in New York. If there were a public policy against the allowance of such interest, the court in the Williamsburgh case would hardly have sanctioned recovery of interest on a coupon held by one who did not hold the bond, where there was not even a covenant to pay such interest. The common appearance of a covenant of this character in contracts for the issuance of corporate bonds and notes indicates its general acceptance by the commercial community. In other states the covenant has uniformly been held valid at common law, even where as in New York agreements in advance for compound interest are not generally recognized. Bowman *v.* Neely, 137 Ill. 443, 27 N. E. 758; Bowman *v.* Neely, 151 Ill. 37, 37 N. E. 840; Parker *v.* McGinty, 77 Colo. 458, 239 P. 10; Central Nat. Bank *v.* Bateman & Companies, 15 Del. Ch. 31, 131 A. 202; Merck *v.* American Land Mortgage Co., 79 Ga. 213, 7 S. E. 265; Murtagh *v.* Thompson, 28 Neb. 358, 44 N. W. 451. It is also significant that by the impressive weight of authority in other jurisdictions overdue coupons are held to draw interest as matter of law, without the assistance of express agreement to that effect by the debtor. 33 Corpus Juris, page 205; Williston on Contracts, section 1417; Daniel on Negotiable Instruments, section 1914. Finally, it is to be borne in mind that in general parties may make what contracts they please. The law enforces the contract as it is written, unless it is contrary to statute or to settled public policy. The burden is on him who asserts invalidity to prove it, and in this case the burden of proving that the covenant to pay interest on overdue coupons is invalid by New York law has not been sustained. The decision is that

the covenant is valid and enforceable under New York law, and that interest at 7 percent should be paid on the outstanding coupons."

Judge PATTERSON's view that under New York law there is a distinction between compound interest and simple interest on an overdue interest claim, was recently adopted by another U. S. District Court sitting in New York. See *In re Realty Associates Securities Corporation*, C. C. H. Bankruptcy Law Service, Third Edition (Current) ¶55690 (D. C., E. D. N. Y., 1946). To the same effect see also *Rich* vs. *The Town of Seneca Falls*, 8 Fed. 852 (C. C. N. D., N. Y., 1881).

The two decisions of Judge CARDOZO which are relied on by the Circuit Court of Appeals (R. 225), are entirely consistent with Judge PATTERSON's reasoning. *Continental Securities Co.* vs. *New York Central & H. Railroad Co.*, 217 N. Y. 119 (1916), involved a plan for the consolidation of certain railroad corporations. The question arose whether under the New York Railroad Law it was permissible to issue, in exchange for existing bonds, new bonds bearing a greater interest rate. Holding that the statute did not prohibit an increase of interest, Judge CARDOZO pointed out that it made no difference that a promise to pay interest was represented by coupons, for "a coupon is merely an incident of the bond without greater force than any other promise for the payment of interest", until detached and separately negotiated. Thus the decision merely reiterates the doctrine of the *Williamsburgh* case, which case, as Judge PATTERSON has made clear, does not deal with the effect of an *express promise* to pay simple interest on interest. In the other decision relied on by the court below, *Newburger-Morris Co.* vs. *Talcott*, 219 N. Y. 505 (1916), Judge CARDOZO interpreted an agreement which provided that interest was to be "charged on the account current * * * at the rate of six percent per annum". The defendant sought to compound interest monthly. The plaintiff objected and was sustained, but there was no discussion by the court, and indeed no dispute by the parties, as to the

validity of an agreement of the kind involved herein, that is, an agreement to pay simple interest on an overdue installment of interest. One of the authorities cited by Judge CARDOZO (*Young* vs. *Hill*, 67 N. Y. at 174), expressly states, as has been pointed out by Judge PATTERSON, that such an agreement "might not be unreasonable or inequitable".

Strong support for the soundness of Judge PATTERSON's analysis of the New York law comes from several decisions of this Court holding that coupons attached to defaulted bonds draw interest from and after maturity under New York law. See *Cairo* vs. *Zane*, 149 U. S. 122, 142 (1893); *Scotland County* vs. *Hill*, 132 U. S. 107, 117 (1889); *Pana* vs. *Bowler*, 107 U. S. 529 (1882). See also N. Y. Civil Practice Act, § 480.

Section 374 of the General Business Law of the State of New York provides that "no corporation shall hereafter interpose the defense of usury in any action". This provision applies to all corporations, whether incorporated in New York or elsewhere. *Southern Life Insurance Co.* vs. *Packer*, 17 N. Y. 51 (1858). While it may be true that respondents' contention as to the invalidity of the interest provision in the case at bar is technically not based on "usury", it cannot be denied that it is based on the allegation of a similar public policy against accumulative interest, and that the difference, if any, between this policy and the policy of the usury laws is verbal rather than real. We submit that the above-quoted statute, if reasonably construed, should prevent a corporate debtor not only from pleading "usury" in the technical sense of the word, but generally from relying upon any public policy invalidating contractual interest provisions. In the *Williamsburg* case this question was not presented, since that case did not involve an express promise to pay interest on overdue interest. In *Young* vs. *Hill*, *supra*, no corporation was involved. The question would seem to be a novel one in New York, so that this Court is free to place a reasonable construction upon the statute. *Meredith* vs. *Winter Haven*, 320 U. S. 228, 237-8 (1943).

Whether one looks to the multi-state or to the intra-state cases in New York, the conclusion is inescapable that the particular promise in issue, which was struck down by the Circuit Court of Appeals as allegedly violating New York law, does not contravene the public policy of New York as declared by the courts of that State, and would have been upheld there. Likewise, if the litigation had been brought in a State court in Illinois or Kentucky, the transaction would have been upheld, since the promise is valid under the law of *each* of the three States involved.

The Circuit Court of Appeals, sitting as a bankruptcy court, thus took it upon itself, purportedly in deference to "local law", to strike down a promise which does not violate the public policy of New York, or of any other State concerned, and which would have been upheld in State court litigation in each of the States with which the transaction has any substantial and natural contact.

Conclusion

It is respectfully submitted that the judgments of the Circuit Court of Appeals, insofar as they reverse the judgment of the District Court, should be reversed with costs, and that the judgment of the District Court should be affirmed with respect to the allowance of interest upon the interest coupons of the First Mortgage Bonds.

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Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. 848, 849. 42-43

In the Matter
of
AMERICAN FUEL & POWER COMPANY,
INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
Debtors.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

—against—

LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the Green Committee and MORRIS GREEN,
Respondents.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

—against—

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON and P. G. MEADOR,
Respondents.

BRIEF OF GREEN COMMITTEE AND MORRIS GREEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. 848, 849.

In the Matter

of

AMERICAN FUEL & POWER COMPANY,
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KENTUCKY FUEL GAS CORPORATION,
Debtors.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

—against—

LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the Green Committee and MORRIS GREEN;
Respondents.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

—against—

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON and P. G. MEADOR,
Respondents.

BRIEF OF GREEN COMMITTEE AND MORRIS GREEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

Petitioner is a committee of first mortgage bondholders of Inland Gas Corporation, debtor in reorganization. The deed of trust, securing the first mortgage bonds, was executed in the State of New York. The bonds and the interest coupons thereto attached were also executed and issued in that state;

and were payable there, at the office of the indenture trustee, or at the option of the bearer, in Illinois. There is no evidence of record that any bondholder demanded payment in Illinois. Nor do the proofs of claim filed by the bondholders indicate that any coupons have been detached from the bonds or negotiated to third parties (Opinion, Circuit Court of Appeals, R. 381, 2; 151 F. (2d) p. 475).

Petitioner seeks to enforce a clause in the deed of trust providing for interest on interest, the construction and validity of which provision under New York law is the matter in dispute between petitioner and other creditors of the corporation. No controlling federal statute on the subject is involved.

Decisions Below.

The District Court, without rendering an opinion, decided that a promise to pay interest on interest is valid under New York law (R. 148).

The Circuit Court of Appeals reversed this decision in an opinion reported 151 F. (2d) 470 (1945), holding such a promise to be invalid under New York law.

Questions Presented.

The questions presented as stated by petitioner are as follows:

1. Whether in determining the rule for the choice of the governing local law concerning the validity of an interest provision in a multi-State contract made by a Debtor in Chapter X Proceedings the bankruptcy court should select the choice of law rule of the forum State.

2. Whether such interest provision is invalid, although it does not violate the public policy of any of the States involved, nor of the United States, and would have been upheld if it had been litigated in the Courts of any of such States.

We do not agree with this statement of the questions involved. The real questions are as follows:

1. Whether an issue of federal choice of law is presented where first mortgage bondholders of a corporation in reorganization proceedings seek to enforce a clause in a deed of trust indenture providing for interest on interest, the construction and validity of which provision under New York law is the matter in dispute between petitioner and other creditors of the corporation, and no controlling federal statute is involved?

2. Whether the considered determination of questions of state law by the Circuit Court of Appeals, predicated upon decisions of the highest court of the state, is ordinarily reviewed by this Court?

ARGUMENT.

I.

No issue of federal choice of law is presented.

The petition for certiorari suggests that there is an issue in this case as to "whether state law or federal law determines the choice of law in bankruptcy."

It is repectfully submitted that no such question is presented by the record in this case, and that the only question involved pertains to state law. The con-

troversy arose solely from the efforts of certain first mortgage bondholders of a corporation in reorganization proceedings to enforce a clause in a deed of trust indenture providing for interest on interest, the construction and validity of which provision under New York law became a matter in dispute between petitioner and the respondents, as creditors of the corporation. No controlling federal statute on the subject is involved.

The petitioner apparently fails to recognize the clear distinction between such a situation and one requiring the interpretation and application of a federal statute. Thus, the petitioner inappositely cites *Wragg* v. *Federal Land Bank*, 317 U. S. 325, where this Court held that in the interpretation and application of the Bankruptcy Act as in the case of other federal statutes, federal not local law, applies; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, in which it was declared to be familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules; *D'Oench* v. *Federal Deposit Insurance Corporation*, 315 U. S. 447, where the respondent, a federal corporation, brought suit under an Act of Congress providing that "All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States"; *McKenzie* v. *Irving Trust Co.*, 323 U. S. 365, holding that "What constitutes a transfer and when it is complete within the meaning of §60a of the Bankruptcy Act is necessarily a federal question, since it arises under a federal statute intended to have uniform application throughout the United States. *Prudence Corp.* v. *Geist*, 316

U. S. 89, 95, and cases cited; *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 204. The statute provides its own definitions. * * * In the absence of any controlling federal statute, a creditor or bona fide purchaser could acquire rights in the property transferred by the debtor, only by virtue of a state law."

Hence, if the Circuit Court of Appeals here had applied a New York rule of law governing insolvency proceedings, or if this case raised questions concerning the equitable power of a federal bankruptcy court to subordinate claims of some creditors to those of others, the petitioner would have an arguable point, since the Bankruptcy Act provides its own criteria for distribution to creditors. (*Prudence Corp.* v. *Geist, supra,* and to the same effect, *American Surety Co.* v. *Sampsell,* decided February, 1946, by this Court.) But there is no issue of state insolvency rules or of federal equitable subordination principles here, for all that the Circuit Court of Appeals in this case had before it for determination, and actually decided, was the construction and validity of a covenant providing for interest on interest, a subject upon which the Bankruptcy Act does not provide its own criteria. Controversies of this sort arising in bankruptcy cases were solved by reference to state law even before the decision of *Erie R. Co.* v. *Tompkins, infra* (*Corn Exchange Bank* v. *Klauder;* 318 U. S. 434).

In *Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487, it was expressly held that the prohibition declared in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, against independent determinations by the federal courts, extends to the field of conflict of laws. We submit that this Court

in *D'Oench* v. *Federal Deposit Insurance Corporation, supra,* cast no doubt upon the application of the *Klaxon* rule to cases where, as here, no federal statute is involved.

Moreover, it is the local factor which produces the variability of result in the various Circuit Courts of Appeal, and the petitioner, in failing to take this into account, arrives at the erroneous conclusion that there is a conflict.

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."
>
> *Ruhlin* v. *New York Life Insurance Co.,* 304 U. S. 202, 206 (1938).

As to *Seeman* v. *Philadelphia Warehouse Company,* 274 U. S. 403 (1927), relied upon by the petitioner, we need only refer to the *Corn Exchange Bank* case, *supra,* where the decision in *Salem Trust Co.* v. *Manufacturers Finance Co.,* 264 U. S. 182, of a similar question as a matter of "general law" was held to be inapplicable since the decision of the *Tompkins* case, *supra.*

Whether the bankruptcy court in passing upon the construction and validity of the contract provision in question was sitting as a court of law or as a court of equity, the state court decisions were controlling (*Ruhlin* v. *New York Life Insurance Co., supra*).

It follows from the foregoing that the instant case presents no issue of federal choice of law.

II.

Considered determination of state law by the Circuit Court of Appeals, predicated upon decisions of the highest court of the state, is not ordinarily reviewed by this Court.

The deed of trust, securing the first mortgage bonds, was executed in the State of New York. The bonds and the interest coupons thereto attached were also executed and issued in that state; and were payable there, at the office of the indenture trustee, or, at the option of the bearer, in Illinois. There is no evidence of record that any bondholder demanded payment in Illinois. Nor do the proofs of claim filed by the bondholders indicate that any coupons have been detached from the bonds or negotiated to third parties (*Opinion, Circuit Court of Appeals*, R. 381, 2; 151 F. (2d), p. 475).

At this point we desire to draw attention to the fact that the petitioner erroneously states in a footnote to page 14 of its petition that "during all the period when these coupons became due the Company was either in Federal Equity Receivership or in 77-B or Chapter X proceedings," with references to pages 303 and 173 of the Record. The record references, however, do not support the petitioner's statement. At page 303 of the Record (the first reference), it appears that the initial appointment of a Receiver for the Company was on December 2, 1930. At page 173 of the Record (the second reference), we find a balance sheet of the Company as of December 2, 1930, the inception date of the receivership. Under "Accrued Interest on Funded Debt" appears the item "Payable February 1, 1931 on First Mortgage 6½% Bonds,

due February 1, 1938 . . . $93,655.37." As the bonds were issued February 1, 1928, it is obvious that the following coupons were paid prior to any receivership, 77-B or Chapter X proceedings: Coupon #1, due August 1, 1928; Coupon #2, due February 1, 1929; Coupon #3, due August 1, 1929; Coupon #4, due February 1, 1930; Coupon #5, due August 1, 1930.

Since, as stated by the Circuit Court of Appeals, the option of the bearer to demand payment in Illinois was never exercised, the primary place of payment was New York (Restatement, Conflict of Laws, §356). Hence, New York was not only the place of contracting but also the primary place of performance of the contract in question.

The Court of Appeals of Kentucky (the forum state) has declared that "it may be stated without exception that if under the *lex loci contractus* the contract for any reason is void, it will be invalid everywhere, and will not be enforced by the *lex fori,* although it would be valid if executed in that jurisdiction" (*Moody* v. *Barker,* 188 Ky. 401, 403).

In New York, the leading case on the subject of applicable choice of law is *Holley* v. *Talcott,* 129 App. Div. 233 (1st Dept., 1908), where it was held that the interpretation and validity of a contract for the loan of money is to be determined by the law of the place where the contract was made. The Court decided, therefore, that since the agreement to loan money took place in New York, the contract was a New York contract though the notes evidencing the transaction were signed and made payable in Pennsylvania, and the question as to whether it was usurious must be determined by the law of New York, not by that of Pennsylvania.

Nothing to the contrary was held in *Westchester Mortgage Co.* v. *Grand Rapids and Ionia Railroad Co.*, 246 N. Y. 194, cited by the petitioner, for it is clearly distinguishable on its facts. As was there stated (per Lehman, *J.*):

> "Unquestionably the note is usurious if it was made in the State of New York, and is governed by the laws of this State. The Appellate Division has made findings and conclusions to the effect that the note was made and delivered in Rhode Island, and its validity must be determined by the laws of that State" (p. 197).

Distinguishable, too, as involving a contract made elsewhere than in the State of New York, is the case of *Curtis* v. *Leavitt*, 15 N. Y. 9, upon which the petitioner relies. At page 227 of the opinion there we find the following:

> "The documentary and oral evidence shows that the contract for the sale of these bonds was made and the money advanced on them paid in England; that the semi-annual interest to accrue thereon was to be paid in London, and the principal ultimately to be repaid there. * * * These facts make the contract an English contract; and the question of usury, therefore, is to be determined by the English law."

The Circuit Court of Appeals in the instant case correctly ascertained the law of New York to be that a covenant made prior to the accrual of interest, to pay interest on interest, is contrary to the public policy of the state and is, therefore, unenforceable.

State of Connecticut v. *Jackson*, 1 Johns. Ch. 13;

Van Benschooten v. *Lawson*, 6 Johns Ch. 313;
Mowry v. *Bishop*, 5 Paige's Ch. 98;
Toll v. *Hiller*, 11 Paige's Ch. 228;
Forman v. *Forman*, 17 Howard's Practice Rep. 255;
Stewart v. *Petree*, 55 N. Y. 621;
Young v. *Hill*, 67 N. Y. 162;
Bailey v. *Buchanan County*, 115 N. Y. 297;
Williamsburgh Savings Bank v. *Town of Solon*, 136 N. Y. 465;
Columbus, S. & H. R. Co. Appeals, 109 Fed. 177 (C. C. A. 6);
In re Wisconsin Central Railway Company, 63 F. Supp. 151 (D. C., D. Minn. 1945).

Similarly relied upon by the Circuit Court of Appeals were two opinions of Mr. Justice Cardozo, writing for the Court, in *Continental Securities Co.* v. *N. Y. C. & H. R. Co.*, 217 N. Y. 119, 125:

> "It makes no difference that the promise to pay interest is represented by coupons. Until detached and separately negotiated, a coupon is merely an incident of the bond without greater force than any other promise for the payment of interest (*Williamsburgh Savings Bank* v. *Town of Solon*, 136 N. Y. 465, 481)."

And in *Newburger-Morris Co.* v. *Talcott*, 219 N. Y. 505, 510:

> "The charge of compound interest was correctly disallowed. The rule is settled that a promise to pay interest upon interest is void if made at a time before simple interest has accrued (*Young* v. *Hill*, 67 N. Y. 162). The provision in the contract that interest shall be 'charged on the account current * * * at the rate of 6 per cent per

annum,' must, therefore, mean simple interest. Any other promise, made at the outset of the dealings would be invalid."

As was stated by this Court in *Huddleston* v. *Dwyer*, 322 U. S. 232, 237:

> "The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts, cf. *Ruhlin* v. *New York Life Ins. Co., supra.*"

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1945

Nos. ~~848, 849, 850, 851~~. 42 – 45

In the Matter of
AMERICAN FUEL AND POWER COMPANY,
INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
Debtors.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE, - - - - - - - - Petitioner,

versus

LOUIS A. GREEN AND ROBERT HEILBRUNN, Known in these Proceedings as the Green Committee, AND MORRIS GREEN, - - - Respondents.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE, - - - - - - - - Petitioner,

versus

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON AND P. G. MEADOR, - - - - - - - - Respondents.

In the Matter of

VANHORN BONDHOLDERS PROTECTIVE COMMITTEE, - - - - - - - - Petitioner,

versus

LOUIS A. GREEN AND ROBERT HEILBRUNN, Known in these Proceedings as the Green Committee, AND MORRIS GREEN, Et AL., - - Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONSE OF CARL B. EARLY, ET AL., RESPONDENTS.

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IN THE

Supreme Court of the United States

October Term, 1945

Nos. 848, 849, 850, 851.

IN THE MATTER OF

AMERICAN FUEL AND POWER COMPANY,
INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,

DEBTORS.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE, - - - - - - - - *Petitioner,*

v.

LOUIS A. GREEN AND ROBERT HEILBRUNN, KNOWN IN THESE PROCEEDINGS AS THE GREEN COMMITTEE, AND MORRIS GREEN, *Respondents.*

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE, - - - - - - - - *Petitioner,*

v.

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON AND P. G. MEADOR, - - - - - *Respondents.*

IN THE MATTER OF

VANHORN BONDHOLDERS PROTECTIVE COMMITTEE, - - - - - - - - *Petitioner,*

v.

LOUIS A. GREEN AND ROBERT HEILBRUNN, KNOWN IN THESE PROCEEDINGS AS THE GREEN COMMITTEE, AND MORRIS GREEN, ET AL., - - - - - - - *Respondents.*

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

RESPONSE OF CARL B. EARLY, ET AL., RESPONDENTS.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported 151 Fed. (2d) 470. The District Court rendered no opinion, but, during argument, stated the grounds for its decision (R. 148) and, thereafter, made an order and judgment embodying findings of fact and conclusions of law (R. 348).

JURISDICTION.

The judgment sought to be reviewed was entered October 9, 1945 (R. 375), and a petition for rehearing was denied November 26, 1945 (R. 411). The petition for certiorari of Vanston Bondholders Protective Committee (Nos. 848, 849), was filed February 14, 1946, and the petition for certiorari of Vanhorn Bondholders Protective Committee (Nos. 850, 851), was filed February 15, 1946. In each petition for certiorari the jurisdiction of this Court is invoked under §240 of the Judicial Code, as amended, and the petition for certiorari of the Vanston Bondholders Protective Committee also invokes the jurisdiction of this Court under §24 of the Bankruptcy Act, as amended.

STATEMENT.

On February 1, 1928, the debtor, Inland Gas Corporation, a Delaware corporation, executed and delivered in the State of New York a deed of trust to Chatham Phenix National Bank & Trust Company and

James F. McNamara, Trustees, under which a first lien on all the property of the Inland Gas Corporation therein described, and which consisted of substantially all of its property, was given as security for the payment of an issue of $4,400,000.00 par value of 6½% first mortgage bonds maturing on the first day of February, 1938. The interest on the bonds was represented by coupons attached, payable semi-annually.

The bonds provided that they were payable:

> "at the principal office of the Chatham Phenix National Bank & Trust Company, or its successor in trust under the Indenture hereinafter mentioned (hereinafter called the Trustee), in the Borough of Manhattan, City and State of New York, or, at the option of the bearer or such registered owner, at the principal office of the Continental National Bank & Trust Company, in the City of Chicago, State of Illinois." (R. 354)

The coupons provided that they were payable:

> "at the principal office of Chatham Phenix National Bank & Trust Company, in the Borough of Manhattan, City and State of New York, or at the option of the bearer, at the principal office of the Continental National Bank & Trust Company in the City of Chicago, State of Illinois." (R. 359-360)

The trust indenture securing the bonds and coupons provides for the payment of interest on defaulted bonds and coupons, from their respective due dates until paid, at the same rate as that applicable to the bonds before

maturity, but there is no such provision in either the bonds or coupons attached thereto.

At the time of the institution of bankruptcy proceedings substantially all of the bonds were past due and unpaid, as is true of the interest coupons which matured after August 1, 1930. The past due coupons had not been detached from the bonds or negotiated to third parties. The record contains no proof that the holders of any of the past-due bonds or coupons exercised their option to require payment thereof in Chicago, Illinois, or that the option was so exercised in respect of any of the bonds or coupons that were actually paid.

Inland Gas Corporation also has outstanding and past due since February 1, 1938, $1,450,000.00 par value of 7% debentures and $400,000.00 par value of 6% mortgage notes. No interest has been paid on the debentures since August 1, 1930, and no interest has been paid on the mortgage notes since January 2, 1930. The debentures and the mortgage notes are secured by a second mortgage on the same property embraced in the deed of trust securing the bond issue.

The District Court, on petition by a First Mortgage Bondholders Committee for a distribution upon first mortgage bonds, ruled that the validity of the provision in the trust indenture for the payment of interest on defaulted interest coupons attached to the first mortgage bonds was controlled by the law of the State of New York, and that under the law of that State that provision was valid. He accordingly ruled that the holders of the bonds and attached coupons

were entitled to the payment of the face of the bonds and of the attached coupons and, in addition thereto, to simple interest on the bonds and to simple interest on the past-due coupons from the date of their respective maturities until paid at 6½% per annum. The result of this ruling was to deny the second mortgage-holders any substantial recovery whatever on their securities.

On appeal to the Circuit Court of Appeals for the Sixth Circuit, the ruling of the lower court was reversed, the Circuit Court holding, as did the District Court, that validity of the contract to pay interest on past-due coupons must be determined by the law of New York. That Court, however, held that, under the law of New York, the contract to pay interest on the defaulted coupons was against the public policy of that State and void. This proceeding seeks a review of the decision of the Circuit Court of Appeals.

ARGUMENT.

The petition of the Vanston Bondholders Protective Committee for certiorari states that the case at bar presents two questions justifying a review by this Court. In the language of the petition those questions are:

> "1. Whether in determining the rule for the choice of the governing local law concerning the validity of an interest provision in a multi-State contract made by a Debtor in Chapter X Proceedings the bankruptcy court should select the choice of law rule of the forum State.

2. Whether such interest provision is invalid, although it does not violate the public policy of any of the States involved, nor of the United States, and would have been upheld if it had been litigated in the courts of any of such States."

We shall consider those questions in the order stated.

Question 1.

We believe in the light of this record it may be categorically stated that Question No. 1 posed in the petition is not in this record. The petition proceeds upon the theory that the contract, although made in New York, was to be performed in the State of Illinois, and that, therefore, the record presents the question of whether the validity of the contract to pay interest on past-due coupons should be resolved according to the law of New York, the State in which the contract was made, or according to the law of Illinois, the alleged State of performance. If petitioners' assumption that the contract was to be performed in Illinois is erroneous, then the entire basis for the claimed existence of Question No. 1 disappears.

As shown in our statement, each of the coupons provided that it was payable "at the principal office of Chatham Phenix National Bank & Trust Company, in the Borough of Manhattan, City and State of New York, or, *at the option of the bearer,* at the principal office of the Continental National Bank and Trust Company in the City of Chicago, State of Illinois" (Emphasis ours). This language is subject to only

one construction, and that is that there was only one absolute and unqualified place of payment fixed in the coupon; and that was New York. No coupon ever became payable in Chicago, unless and until the holder thereof had exercised his option to have it paid there. It is the general rule that where the place of performance is left to the option of one of the parties, that place remains undetermined until such party has exercised his option. *Restatement Conflict of Laws,* Sec. 356; *Liebeskind* v. *Mexican Light & Power Co.,* 116 Fed. (2d) 971, 973 (2d Cir.); *Lann* v. *United Steel Works Corp.,* 166 Misc. 465, 1 N. Y. S. (2d) 951; *Pan-American Securities Corp.* v. *Krupp Actiengesellschaft,* 169 Misc. 445, 451, 6 N. Y. S. (2d) 993, Affd. 256 N. Y. App. Div. 955, 10 N. Y. S. (2d) 205. On the other hand, it would seem axiomatic that if the contract specifically provides that the place of performance shall be at a designated place, unless one of the parties elects that the performance shall be elsewhere, the place fixed in the contract is the place of performance unless and until the option to designate otherwise has been exercised. Now, in this case, the holders of the coupons asserted their claim to interest on the coupons in the bankruptcy proceeding. The allowance of interest was resisted on the ground that the contract providing for the payment of interest was a New York contract and void against the public policy of that state. It would seem clear that in that situation, if the coupon holder desired to claim that the place of the payment of his coupon was Chicago, Illinois, the burden was upon him to show that he had

exercised his option to have payment made there. The record contains no such showing. It is familiar law that one claiming rights under an option must prove substantial compliance with the terms thereof.

The brief in support of the petition of the Vanston Committee, at page 14 in a footnote, suggests the futility of the holder demanding payment in Illinois, in the exercise of his option so to do, for the reason that at the time the coupons here involved matured, Inland was in receivership. Instead of that situation aiding petitioner's case, it seems to us that it all the more conclusively establishes New York as the contract place of payment. When the holders of coupons acquired them, they, in law, agreed that, unless and until they exercised their option, the place of payment should be New York. We fail to understand how the failure to exercise the option because of the futility of so doing can alter the situation. Whatever the reason for failure to exercise the option, it is a fact, nevertheless, that it was not exercised.

The opinion of the Circuit Court of Appeals refers to the fact that the record contains no evidence that any bondholder demanded payment in Illinois, and then proceeds to state:

> "New York is the state where the contracts were made and is also the primary place of performance. In all the circumstances, it would seem, therefore, that we must look to the law of New York for decisive guidance."

It seems to us from the quoted language that the Circuit Court of Appeals approached the problem pre-

sented on the premise that the contract was not only made in New York but was to be performed there.

The petition of the Vanston Committee states that the Circuit Court of Appeals "in choosing the governing law had first to determine which body of law was the proper source for the applicable rule determining such choice and it erroneously held that the law of the State in which the District Court was located determined the choice." We do not so understand the opinion. We understand that opinion, the Circuit Court concluded that under the Federal rule applicable to the *particular facts of the case*, the law of New York determined the validity of the contract. If the opinion, to the effect New York was the place of contracting as well as performance, is sound, undoubtedly, the Federal rule requires that the validity of the contract shall be determined by New York law. The Circuit Court of Appeals also examined the law of the State of Kentucky, and concluded that under the law of that state as applied to the facts, the validity of the contract must be determined by the law of New York. Hence, the Circuit Court of Appeals did not feel itself confronted with the necessity of determining whether the Kentucky rule or the Federal rule was controlling, as, in this case, they are exactly the same.

It is submitted that *Seeman* v. *Philadelphia Warehouse Company*, 274 U. S. 403 (1927); and *Cromwell* v. *County of Sac*, 96 U. S. 51 (1877), cited in petitioner's brief, if applicable in any case since *Erie R. Co.* v. *Thompkins*, 304 U. S. 64 (1938), have no application here. All that those cases decide is that if a con-

tract for the payment of money, with interest, is made in one state and by its terms is unconditionally payable in another, and the permissible rate of interest is higher in one of the states than in the other, the higher rate of interest may be collected, provided the arrangement is not a sham to permit the collection of a higher rate of interest than would have been permissible had the contract actually expressed the real agreement of the parties. Those cases, however, are not applicable to the case at bar, for, as demonstrated above, the contract under consideration here not only was made, but was to be performed, in New York.

Petitioner apparently recognize that the only justification for asking this Court to review the decision of the Circuit Court of Appeals is that a reversal would make for uniformity in the administration of the Federal bankruptcy law. It seems to us that the contention is fallacious. We assume that the uniformity with which this Court would be concerned is uniformity of result. Uniformity could not possibly result even should this Court reverse the Circuit Court of Appeals and hold that Illinois was the place of performance, and that in bankruptcy proceedings the validity of contracts must be determined by the law of the state of performance. There cannot be uniformity of result whether this Court decides that in such proceedings the choice of law must be that of the state of performance or leaves the choice to be made in accordance with the law of the forum. In either case the local factor will inevitably produce variability. The decisions of this Court disclose that where the

Federal bankruptcy statute does not provide any criteria, the Court has not sought uniformity of result, but has applied the applicable local law. Thus, it has been held that in bankruptcy proceedings the validity and construction of a contract executed more than four months before bankruptcy, and forming the basis of a claim filed in such proceedings, must be determined by state law. *Benedict, Receiver,* v. *Ratner,* 268 U. S. 353; *Security Mortgage Company* v. *Powers,* 278 U. S. 149; and that the effectiveness of a transfer as against a trustee in bankruptcy must be tested by the standards which the applicable state law would enforce against a good faith purchaser. *Corn Exchange Bank* v. *Klauder, Trustee,* 318 U. S. 434; *McKenzie* v. *Irving Trust Company,* 323 U. S. 365.

The rule which petitioner seeks to have the Court announce would make the choice of law rule, and in turn the validity of contracts, depend upon the basis of the jurisdiction of the Federal Court. In *Klaxon Co.* v. *Stentor Company,* 313 U. S. 487, this Court held that in diversity of citizenship cases, the Federal Courts, when deciding questions of conflict of laws, must follow the rules prevailing in the states in which they sit. Should petitioner's contention be upheld, the validity of the same contract would frequently be determined by the law of one state if its validity was involved in a diversity of citizenship proceeding, and by the law of an entirely different state if it was involved in a bankruptcy proceeding. Consider what would be the situation in respect of the very contract here involved, if we accept petitioner's premise that Illinois

is the state of performance. As we understand, the bulk of the property covered by the trust indenture is located in Kentucky. Suppose the trustee for the bondholders or the holders of coupons had brought suit in a Federal Court in Kentucky on the jurisdictional ground of diversity of citizenship to foreclose the mortgage. Under the thoroughly settled rule, as announced by the Kentucky cases hereafter to be noted, unquestionably, the validity of the contract to collect interest on the coupons would be determined by the law of New York, while in this bankruptcy proceeding it would be determined by the law of Illinois. It seems to us that a rule which makes the validity of a contract involved in a Federal Court proceeding depend upon no more substantial ground than the basis of the Court's jurisdiction would be so unreasonable and intolerable as to justify this Court in summarily rejecting the rule by a denial of the petition herein.

Question 2.

At p. 14 of the Vanston Committee brief appears this statement:

> "The interest provision is valid since (a) it does not violate the public policy of any of the States involved, nor of the United States, and (b) the provision would have been upheld had there been litigation concerning its validity in the Courts of any of the States involved."

The Circuit Court of Appeals opinion holds that the contract is in violation of the public policy of the

State of New York and sustains its conclusion by citation and analysis of many New York cases, as well as Federal cases. No reported New York case is in conflict with the cases cited in the Circuit Court of Appeals opinion. Among the many New York cases holding that such contracts as the one here involved are against the public policy of that State, we cite: *State of Connecticut* v. *Jackson,* I Johns Ch. 13 (1814); *M. & J. VanBenschooten* v. *Lawson,* 6 Johns Ch. 313 (1822); *Mowry* v. *Bishop,* 5 Page's Ch. 98 (1835); *Toll* v. *Hiller,* 11 Page's Ch. 228 (1844); *Forman* v. *Forman,* 17 Howard's Practice Rep. 255 (New York Supreme Court 1859); *Stewart* v. *Petrie,* 55 N. Y. 621 (1874); *Young* v. *Hill,* 67 N. Y. 162 (1876); *Bailey* v. *Buchanan County,* 115 N. Y. 297 (1889); *Williamsburg Savings Bank* v. *Town of Solon,* 136 N. Y. 465 (1893); *Continental Securities Company* v. *New York Central & H. Railroad,* 217 N. Y. 119 (1916), opinion by Mr. Justice Cardozo; *Newburger-Morris Company* v. *Talcott,* 219 N. Y. 505 (1916), opinion by Mr. Justice Cardozo; and *Chase National Bank* v. *Clark Henry Corporation,* 156 Misc. 767 (1935).

The Federal Courts have placed upon those State decisions the same construction as did the Sixth Circuit: *In Re: Columbus S. H. & H. R. Co.,* 109 Fed. 177 (1901 C. C. A. 6th); *American Brake Shoe & F. Co.* v. *Interborough Rapid T. Co.,* 11 Fed. Supp. 418 (1935 D. C. N. Y.); *Transbel Inv. Co.* v. *Roth,* 36 Fed. Supp. 396 (1940 D. C. N. Y.); and *In Re: Wisconsin Cent. Ry. Co.,* 63 Fed. Supp. 151 (1945 D. C. Minn.).

Against this array of cases, the petitioners cite only two reported cases: *Westchester Mortgage Co.* v. *Grand Rapids & Ionia Railroad Co.*, 246 N. Y. 194, 158 N. E. 70, and *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 26 Fed. Supp. 954.

In the footnote on page 15 of the petition and brief filed by the Vanston Committee, reference is made to two unreported cases, which are not available to us. The *Westchester Railroad Company* case does not support petitioners' contention. It only held that in an action in New York on a note made, delivered and secured in Rhode Island, the essential provisions of which were to be performed in that State, the validity of its interest rate was determinable according to the laws of Rhode Island. It is admitted that the *American Brake Shoe & Foundry Co.* case, reported in 26 Federal Supplement, at page 945, supports the petitioners' contention, but it is submitted that the New York cases do not sustain the analysis, nor justify the differentiations undertaken to be made by Judge Patterson in that opinion. It is further submitted that one decision of a Federal District Court which has not been followed by later decisions in Federal District Courts does not establish that the Circuit Court of Appeals has decided a question of local law in a way probably in conflict with applicable local decisions.

It is admitted that the contract, had it been made in Kentucky, would not have violated the public policy of that State, but the statement in the brief to the effect that, if the contract in question here had been declared on in a Kentucky State Court, it would have been en-

forced, is not supported by the Kentucky cases. On the contrary, in an unbroken line of cases the Kentucky Court of Appeals has held that the validity of such a contract must be determined in accordance with the laws of the State where made.

Moody v. *Barker*, 188 Ky. 401, 403, 222 S. W. 89, announces the State rule:

> "It may be stated without exception that, if under the *lex loci contractus* the contract for any reason is void, it will be invalid everywhere, and will not be enforced by the *lex fori*, although it would be valid if executed in that jurisdiction."

Of the many Kentucky cases following the rule so announced, we cite: *Fry Bros.* v. *Theobold*, 205 Ky. 146, 148-149, 265 S. W. 498; *Cooper's Adm'r* v. *Lebus' Adm'rs*, 262 Ky. 245, 90 S. W. (2d) 33; *Deins' Adm'r* v. *Gibbs*, 257 Ky. 469, 78 S. W. (2d) 346; *Ford* v. *Buckeye State Ins. Co.*, 6 Bush 133; *Griswold* v. *Golding*, 8 Ky. L. Rep. 777, 3 S. W. 535; *Clarey* v. *Union Central Life Ins. Co.*, 143 Ky. 540, 136 S. W. 1014, and *Troendle, et al.* v. *Highleyman* (Ky.), 113 S. W. 812.

The petitioners cite (p. 16 of their brief) *Commonwealth Farm Loan Co.* v. *Caudle*, 203 Ky. 761, 263 S. W. 24; *William Glenny Glass Co.* v. *Taylor*, 99 Ky. 24, 34 S. W. 711, and *Pensacola & A. R. Co.* v. *Hilton's Trustee*, 147 Ky. 553, 144 S. W. 1077, as announcing a contrary rule, but a reading of those cases readily discloses that they do not justify the confidence placed in them by petitioners. In the *Commonwealth Farm Loan Company*, case, the Court stated that it *might* apply a rule that where notes are executed in one state

and payable in another, the parties may lawfully contract for the highest legal rate of interest permissible by the laws of either state. However, it did not apply such a rule in that case. Consequently that case cannot be accepted as modifying to any extent the rule laid down in the Kentucky cases above cited.

In the case of *William Glenny Glass Company* v. *Taylor, supra,* the note involved was void under New York Law, but valid under Kentucky law. The Court found as a fact, and any other finding would have been unjustified, that the note was executed in Kentucky and hence, under the Kentucky rule, its validity was determined under Kentucky law, even though payable in New York.

Pensacola & A. R. Co. v. *Hilton's Trustee, supra,* is inapplicable. The question here presented was neither raised nor considered by the Court. Questions that merely lurk in a record, but which are neither brought to the attention of the Court nor ruled upon are not to be considered as having been so decided as to constitute precedents. *Webster* v. *Fall,* 266 U. S. 507; *United States* v. *Mitchell,* 271 U. S. 9; *Bingham* v. *United States,* 296 U. S. 211; *Rex Coal Co.* v. *Campbell,* 213 Ky. 636.

It is submitted that, in the light of the foregoing authorities, the Circuit Court of Appeals correctly interpreted the New York and Kentucky cases. However, if there is any doubt on this point, we cannot believe the Court will grant *certiorari* merely to determine for itself whether the Circuit Court of Appeals correctly interpreted the decisions of the New York

and Kentucky Courts on the matter which has no national concern.

CONCLUSION.

The decision of the Circuit Court of Appeals was the result of careful consideration and is correct in all respects. There is no conflict between the Federal rule and the State rule as to the choice of local law, on the facts of the present case, and no question worthy of review is presented. The petitions for writs of *certiorari* should be denied.

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Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 42, 43.

In the Matter

of

AMERICAN FUEL & POWER COMPANY,
INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
Debtors.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

—against—

LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the GREEN COMMITTEE and MORRIS GREEN,
Respondents.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

—against—

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON and P. G. MEADOR,
Respondents.

BRIEF FOR RESPONDENTS GREEN COMMITTEE AND MORRIS GREEN.

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Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 42, 43.

In the Matter

of

AMERICAN FUEL & POWER COMPANY,
INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
Debtors.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

—against—

LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the GREEN COMMITTEE and MORRIS GREEN,
Respondents.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

—against—

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON and P. G. MEADOR,
Respondents.

BRIEF FOR RESPONDENTS GREEN COMMITTEE AND MORRIS GREEN.

Opinions Below.

The District Court rendered no opinion but indicated the reasons for its decision during the argument (R. 56). An order and judgment setting forth the findings of fact and conclusions of law were thereupon entered (R. 192). The opinion of the Circuit Court of Appeals is reported in 151 F. (2d) 479, and is also reprinted at R. 214 *et seq.*

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered on October 9, 1945 (R. 213). Rehearing was denied on November 26, 1945 (R. 241). The petition for writs of certiorari of the Vanston Bondholders Protective Committee (Oct. Term, 1945, Nos. 848 and 849) was filed on February 14, 1946, and the petition for certiorari of the Van Horn Bondholders Protective Committee (Oct. Term, 1945, Nos. 850 and 851), on February 15, 1946. Writs of certiorari were granted on March 25, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. Sec. 347(a), and Section 24(c) of the Bankruptcy Act, as amended, 11 U. S. C. Sec. 47(c).

Statement of Case.

On December 1, 1930 a bill of complaint was filed by Williams and Gibson, plaintiffs, against Inland Gas Corporation, defendant (hereinafter called "Inland"), in the District Court of the United States, Eastern District of Kentucky, alleging diversity of citizenship as the basis of jurisdiction, and praying for the appointment of a receiver in equity of Inland (R. 101). Upon such bill of complaint an order was made and filed December 2, 1930 appointing W. E. Lockhart, Receiver of Inland (R. 113). The equity receivership was continued until October 26, 1935, when an order was entered appointing a temporary trustee in reorganization proceedings under Section 77B of the Bankruptcy Act, which was followed by an order, filed November 23, 1935, making permanent the appointment of such trustee. The provisions of Chapter X of

the Bankruptcy Act were subsequently made applicable to these proceedings (R. 191).

Through the indenture trustees, Chatham Phenix National Bank and Trust Company and James F. McNamara, Inland paid in the City and State of New York, where said trustees maintained their office, the semi-annual interest coupons on its first mortgage bonds until it defaulted on the semi-annual interest coupon due February 1, 1931 (R. 187). On April 3, 1931 the indenture trustees declared the entire principal due and payable pursuant to the acceleration provisions of the indenture. This was followed by a bill of foreclosure filed by the indenture trustees on April 14, 1931.

Petitioner is a committee of first mortgage bondholders of Inland. The indenture, or deed of trust, securing the first mortgage bonds, was executed in the State of New York. The bonds and the interest coupons thereto attached were also executed and issued in that State; and were payable at the office of the indenture trustee, or, at the option of the bearer, in Illinois. There is no evidence of record that any bondholder demanded payment in Illinois. Nor do the proofs of claim filed by the bondholders indicate that any coupons had been detached from the bonds or negotiated to third parties (R. 219).

Petitioner seeks to enforce a clause in the indenture, or deed of trust, providing for interest on interest, the validity of which provision is the matter in dispute between petitioner and other creditors of Inland.

The District Court, without rendering an opinion, decided that the provision for interest on interest was valid under New York Law (R. 56). The Circuit Court of Appeals reversed this decision, holding such a provision to be invalid under New York Law (R. 213).

Summary of Argument.

1. The Federal Court sitting in a bankruptcy case in Kentucky should apply the conflict of laws rules of Kentucky in determining the validity of a contract.

2. Under the conflict of laws rules of Kentucky the local law of New York as to the validity of a provision for interest on interest is controlling.

3. The considered determination by the Circuit Court of Appeals of the interest on interest question, predicated upon decisions of the New York Court of Appeals, should not be overruled.

ARGUMENT.

I.

The Federal Court sitting in a bankruptcy case in Kentucky should apply the conflict of laws rules of Kentucky in determining the validity of a contract.

A. The Validity of the Provision for Interest on Interest Was Governed Initially by State Law.

The contract in question was governed in its inception by State law. Neither the Bankruptcy Law nor any other Federal law applied to the contract when made. The Bankruptcy Law does not assume to change the substantive rights and duties of the creditors and the bankrupt. It leaves these to the determination of State law. In *Hiscock* v. *Varick Bank of New York*, 206 U. S. 28, 38, a bankruptcy case, this Court said:

"The questions of the extent and validity of the

pledge were local questions, and the decisions of the courts of New York are to be followed by this court."

If, therefore, the whole loan contract was made in Kentucky, a Federal Court sitting in Kentucky would undoubtedly use Kentucky law, whether the Federal Court were sitting in a diversity of citizenship case or in a bankruptcy case.

And when the contract, as here, is made in one State (New York) and its validity is being determined in a bankruptcy proceeding pending in another State (Kentucky), the determination is still governed by State law, according to State conflict of law principles, for the Federal Court has no power to apply a special law to an occurrence merely because it is a conflict of laws case. So, if this case were in a Kentucky State Court, the Kentucky conflict of laws rules would apply. If it were in the Federal Court in Kentucky on the grounds of diversity of citizenship, the same State law would apply. (*Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941).

Now that the case happens to be in the Federal court on the bankruptcy side, the normal rights of the parties should not be distorted by this accident of forum. The contention of the petitioner is that there should be this alteration of the rights of the parties by the use of a special choice of law rule of the federal courts, only when there is a conflict of laws case in bankruptcy in the Federal court. The recent cases of this Court, it is believed, reject such a conclusion.

B. The Principles of the Decision Rejecting the Doctrine of a Substantive Common Law for the Federal Courts Are Here Applicable.

The old doctrine of *Swift* v. *Tyson*, 16 Pet. 1, was that there was a special body of common law for the federal

courts, different from that which would be applied to the same cases in the State courts. It is this whole doctrine of a special body of substantive law for the federal courts which this Court rejected in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

The opinion of the Court in the *Tompkins* case was not confined in its reasoning to diversity of citizenship cases. As a preliminary, it is true, Justice Brandeis does discuss the Rule of Decisions Act and shows it had been misconstrued in the past. But this misconstruction was expressly stated not to be the ground of the decision, the Court stating:

> "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century" (304 U. S. p. 77).

The Court placed the decision on a principal ground which is equally applicable to the Federal Court sitting in Bankruptcy. This ground is that in this country the law applicable to a case is State law, except where the Constitution or Federal Statutes otherwise provide:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . Congress has no power to declare substantive rules of common law applicable in a state . . . And no clause in the Constitution purports to confer such a power upon the federal courts." (304 U. S. p. 78.)

There were two other grounds of the *Tompkins* decision, which are also present in the principal case. One was the rejection of the old jurisprudential theory of law as a "brooding omnipresence," on which Mr. Justice Holmes had led the attack. In rejecting this view of law, the

Tompkins decision was not confined to the mere diversity of citizenship situation which gave rise to it. As Mr. Justice Frankfurter has put it:

> "In overruling *Swift* v. *Tyson*, 16 Pet. 1, *Erie R. Co.* v. *Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare." (*Guaranty Trust Co.* v. *York*, 326 U. S. 99, 101 (1945).)

Another supporting ground of the *Tompkins* decision was the condemnation of the evils which flowed from the existence of two bodies of law within a single State, one applicable in the State courts, the other in the Federal courts:

> "It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court: . . . Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state." (304 U. S. p. 74.)

These grounds apply with full force here. There are many insolvents who work out their difficulties in State court proceedings or by out-of-court adjustments based on the rights under the applicable State laws. If the determination of the validity and extent of creditors' rights under State law were to be supplanted by a special body of Federal courts' law once a debtor got into bankruptcy, it would bring the same confusion and shopping for a forum which this Court decried.

It will readily be granted by the respondents that the view they urge will not achieve uniformity of law in all

courts, for the law of Kentucky may be different from the law of New York. But the diversities thus produced are the inevitable results of our Federal system, and the existence of these diversities from State to State is assumed and in a measure dealt with by the Federal Constitution as in the full faith and credit clause and the privilege and immunities clause. The existence of such diversities gives no support to the opposing course which would attempt to create uniformity of result in all Federal Courts in Bankruptcy at the cost of diversity between State and Federal Courts in the same State. Mr. Justice Reed states the matter cogently in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941), a case which also involved a controversy over interest in a conflict of laws case:

> "Any other ruling would do violence to the principle of uniformity within a state upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws" (p. 496).

It might be argued that it would be more convenient to the Federal Courts in Bankruptcy and to the Securities and Exchange Commission to administer a single law as to interest or a single law of conflict of laws. Their convenience, however, must give way before the Constitutional requirements for the application of State law in these matters.

C. These Principles Rejecting the Old Doctrine of Federal Courts' Common Law Apply to Conflict of Laws Cases in Bankruptcy.

The existing diversity in the conflict of laws rules of the various states may cause the result to vary with the forum State whose conflict of laws rules are to be used. This, too, is one of the results of our federal system. And this Court has adhered to the policy of the *Tompkins* decision in just such cases and has consistently and unanimously held that the conflicts of laws rules of the forum should be applied. It so held when the question was whether the award of interest after judgment was one of "procedure" governed by the law of the forum or a matter of "substance" governed by the law of the occurrence (*Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941); when the question was one of choice of the governing law of a contract and of public policy (*Griffin* v. *McCoach*, 313 U. S. 498 (1941); and again when the question was as to the burden of establishing contributory negligence (*Palmer* v. *Hoffman*, 318 U. S. 109 (1943).)

There have been repeated efforts to confine the *Tompkins* decision to its facts. This Court, however, has steadily followed the policies underlying the *Tompkins* decision as guide and has given them sweeping application. So it rejected the contention, as already shown, that the principle should not apply in conflict of laws. It first raised the question whether in administering equitable remedies this principle should apply (*Russell* v. *Todd*, 309 U. S. 280, 294); and it then held that in such situations, too, it should apply (*Guaranty Trust Co. of New York* v. *York*, 326 U. S. 99). In the last-mentioned case, involving a statute of limitations, the opinion of

Mr. Justice Frankfurter discusses the guiding policies in the *Tompkins* opinion and then states the question:

> ". . . in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court" (326 U. S. 99, 109).

The petitioner cites several recent cases in which this Court did not apply the law of the State. When these cases are examined, particularly in the light of the various possible sources of rules to which the Federal courts might go, they support, it is believed, the views urged in this brief.

There are three possible choice of law rules which are the subject of argument here. The one, which the respondents urge, is the law of the State in which the court is sitting, Kentucky. The second, which the petitioner contends for, is a special body of law which the petitioner urges should be adopted for the Federal Courts in Bankruptcy. The third is a national law, the law of the land, which would bind all courts alike, Federal and State. It is this last source of law which is employed in the non-diversity cases relied on by the petitioner.

The national law as the governing law may have various foundations, as the decisions of this Court have shown. The activities of the Federal Government and of its instrumentalities may be governed by a law which as to those activities is "the law of the land" and must be used in all courts in which those activities come in issue. So in a suit by the Federal Deposit Insurance Corporation on a right given to it by the implications of a Federal statute, it was held that the law of the State should not

be used (*D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation,* 315 U. S. 447 (1943)). And in a suit by the United States involving a check drawn by the Treasurer of the United States, again the law of the state was not applied (*Clearfield Trust Co.* v. *United States,* 318 U. S. 363).

Similarly, where there is a cause of action arising under a federal statute, it is for the national law to determine the applicable time limitation. In *Holmberg* v. *Armbrecht,* 66 S. Ct. 582 (1946), this principle was applied in a suit to enforce a liability created by the Federal Farm Loan Act.

These cases did not turn on the difference between diversity jurisdiction and non-diversity jurisdiction. Nor did they in any sense involve the use of a special law for the federal courts or for the bankruptcy side of the federal courts. They all involved the application of the law of the land, that is, a national law applicable to determine the rights of the parties in whatever court they may be questioned. The position of the petitioner, it will be remembered, is that there should be a special rule of conflict of laws for the federal courts sitting in bankruptcy, which will be used to determine the validity and extent of the contract rights of private parties. The petitioner's view, if adopted, would again bring to pass the harmful effects pointed out in the *Tompkins* case.

The discussion by Chief Justice Stone in a note to his opinion in *McKenzie, Trustee in Bankruptcy* v. *Irving Trust Co.,* 323 U. S. 365, 371, footnote 2 (1945), is of no aid to the petitioner. The *McKenzie* case involved a problem of preference under Sec. 60-a of the Bankruptcy Act, and held that state standards which control the effectiveness of a transfer likewise determine the precise

time when a transfer is deemed to have been made or perfected. Surely, there is no more reason for the bankruptcy court to devise its own conflict of laws rules for the determination of the validity of claims before it than there would be for it to devise its own standards to control the effectiveness of a transfer or to provide rules for the determination of rights and duties under private contract law or sales law.

In the same way, the opinion of the late Chief Justice in *Heiser* v. *Woodruff*, 66 S. Ct. 853, 855-6 (1946), relied on by the petitioner, is inapplicable here. All that this Court decided in the *Heiser* case was that in passing upon and rejecting or allowing the proof of claim in the case, the court of bankruptcy proceeds—not without appropriate regard for rights acquired under state law—under federal statutes which govern the proof and allowance of claims based on judgments. There was no question of the validity of a contract involved in that case.

D. The Choice of Law Rule Enunciated in Seeman v. Philadelphia Warehouse Company Has No Application to This Case.

The deed of trust, securing the Inland first mortgage bonds, was executed in the State of New York. The bonds and the interest coupons thereto attached were also executed and issued in that State; and were payable there, at the office of the indenture trustee, or, at the option of the bearer, in Illinois. There is no evidence of record that any bondholder demanded payment in Illinois. Nor do the proofs of claim filed by the bondholders indicate that any coupons have been detached from the bonds or negotiated to third parties (R. 219).

The petitioner seeks to avoid the reference to New York

law, by relying upon the case of *Seeman* v. *Philadelphia Warehouse Company*, 274 U. S. 403.

Although it is our contention that the rule of the *Seeman* case is in no event applicable here since the decision of the *Tompkins case* (footnote 8, opinion of Mr. Justice Jackson, *Corn Exchange Bank* v. *Klauder*, 318 U. S. 434, 437), we further urge that the *Seeman* case is distinguishable from the instant case on its facts.

As we have already seen, New York was the place of contracting and the primary place of performance in the case at bar. In fact, it was the only place of actual performance. The option to receive payment in Illinois never having been exercised, no valid argument may be predicated upon the hypothetical situation that might have arisen if such option had been exercised. (Restatement Conflict of Laws, Sec. 356; *Liebeskind* v. *Mexican Light & Power Co.*, 116 F. 2d, 971, 973; *Lann* v. *United Steel Works Corp.*, 166 Misc. 465, 1 N. Y. S. 2d, 951; *Pan-American Securities Corp.* v. *Krupp Actiengesellschaft*, 169 Misc. 445, 451, 6 N. Y. S. 2d, 993, Affd. 256 App. Div. 955, 10 N. Y. S. 2d, 205.) In the *Seeman* case, on the other hand, there was no question that repayment was stipulated to be made in Pennsylvania.

Moreover, the crux of the *Seeman* decision is that Pennsylvania, in addition to the fact that it was the agreed place of repayment, possessed a substantial relationship to the transaction. Holding there that the "effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties' entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject," this Court went on to emphasize that the lender in that case "organized and con-

ducting its business in Pennsylvania, was subject to the laws of that state and had a legitimate interest in seeking their benefit."

But in the instant case, the record discloses that all the parties to the Deed of Trust were located in New York, except the debtor, which in any event had no office and carried on no business in Illinois. Hence, Illinois was a place which had "no normal relation to the transaction and to whose law they would not otherwise be subject."

Alternatively, the petitioner argues that the *Seeman* case is authority for a choice of law rule which would make Kentucky law the source of jurisprudence governing the case at bar, because the mortgaged property is situated there. The fallacy in this contention is twofold. First, in the *Seeman* case Pennsylvania was the stipulated place of repayment, while in the instant case Kentucky was not the stipulated place of repayment. Second, it has been expressly held by this Court that the *lex loci contractus* must govern in a question of usury, although the debt is secured by a mortgage on real property in another state. In *De Wolfe* v. *Johnson,* 10 Wheat. 383, this Court said:

> "With regard to the locality of the contract of 1815, we have no doubt that it must be governed by the law of Rhode Island. The proof is positive that it was entered into there, and there is nothing that can raise a question but the circumstance of its making a part of the contract that it should be secured by conveyances of Kentucky land. But the point is established, that the mere taking of foreign security does not alter the locality of the contract with regard to the legal interest. Taking foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract of loan,

on the part of the borrower, is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract."

II.

Under the conflict of laws rule of Kentucky the local law of New York as to the validity of a provision for interest on interest is controlling.

A. The Kentucky Conflict of Laws Rule Refers to New York as the Source of the Governing Law.

In *Moody* v. *Barker*, 188 Ky. 401, 403, the Court of Appeals of Kentucky declared:

> "It may be stated without exception that if under the *lex loci contractus* the contract for any reason is void, it will be invalid everywhere, and will not be enforced by the *lex fori*, although it would be valid if executed in that jurisdiction."

The petitioner cites *Commonwealth Farm Loan Co.* v. *Caudle*, 203 Ky. 761, 263 S. W. 24; *William Glenny Glass Co.* v. *Taylor*, 99 Ky. 24, 34 S. W. 711, and *Pensacola & A. R. Co.* v. *Hilton's Trustee*, 147 Ky. 553, 144 S. W. 1077, as announcing a contrary rule, but a reading of those cases readily discloses that they do not justify the interpretation placed upon them by petitioner. In the *Commonwealth Farm Loan Company* case, *supra*, the Court stated that it *might* apply a rule that where notes are executed in one state and payable in another, the parties may lawfully contract for the highest legal rate of interest permissible by the laws of either state. However,

it did not apply such a rule in that case. Consequently that case cannot be accepted as modifying to any extent the rule laid down in the *Moody* case above cited.

In the case of *William Glenny Glass Company* v. *Taylor, supra,* the note involved was void under New York law, but valid under Kentucky law. The Court found as a fact, and any other finding would have been unjustified, that the note was executed in Kentucky and hence, under the Kentucky rule, its validity was determined under Kentucky law, even though payable in New York.

Pensacola & A. R. Co. v. *Hilton's Trustee, supra,* is inapplicable. The question here presented was neither raised nor considered by the Court. Questions that merely lurk in a record, but which are neither brought to the attention of the Court nor ruled upon' are not to be considered as having been so decided as to constitute precedents. (*Webster* v. *Fall,* 266 U. S. 507; *United States* v. *Mitchell,* 271 U. S. 9; *Bingham* v. *United States,* 296 U. S. 211; *Rex Coat Co.* v. *Campbell,* 213 Ky. 636.)

The suggestion by the petitioner that the Kentucky courts would use any bona fide contact with any State whose local law would uphold the interest provision is not sustained by any Kentucky decisions cited by petitioner.

New York was here the place of making of the contract; the place of performance thereof; and the place where the indenture trustee and the individual trustee were located. New York is the State of overwhelmingly dominant connections with the contract. New York, therefore, is the place whose law is to govern. Two other places are suggested by the petitioner, Illinois and Kentucky.

Illinois is suggested because it was a place of possible payment. The bonds provided that they would be paid in

New York, "or, at the option of the bearer or such registered owner" in Illinois. The record fails to disclose that any of the bondholders have demanded payment be made to them in Illinois, and in the absence of such a demand the place of payment is that provided in the bond, New York. (Restatement Conflict of Laws, Sec. 356.)

Kentucky is suggested by the petitioner because the property under the mortgage was in Kentucky. No Kentucky authority is cited by the petitioner to support this suggestion, and none seems to exist.

Moreover, the Circuit Court of Appeals having based its decision as to the Kentucky choice of law rule upon the determinations of the highest courts of the State, it should not be disturbed (*Huddleston* v. *Dwyer*, 322 U. S. 232, 237).

B. The Kentucky Conflict of Laws Rule in Referring to New York Requires the Application of the New York Local Law against Interest on Interest.

When Kentucky refers to New York as the State whose law should apply, it naturally refers to the ordinary or local law of New York. So in this case it would use the New York law against interest on interest.

It is argued, however, by the petitioner, first, that Kentucky in referring to New York should apply the New York rule of conflict of laws and should follow where it leads, and, second, that New York has a different conflict of laws rule from that which the respondents believe Kentucky has, and that the New York rule would use the Kentucky or Illinois law.

The first of these arguments calls for the adoption of the doctrine of the *renvoi*. No Kentucky authority is cited in support of the use of the *renvoi*, and none seems to exist. There is little support in any American state

for the *renvoi*. Judge Goodrich in his treatise writes: "The theory of *renvoi* has been the subject of much legal discussion, most of which has condemned its application in all but a few situations" (Goodrich, Conflict of Laws (2d ed., 1938), p. 12). The Restatement of Conflict of Laws condemns the use of the *renvoi* except in matters of divorce and of title to land (Restatement, Conflict of Laws, Secs. 7, 8, discussed in Beale, Conflict of Laws (1935), Secs. 7.3, 8.1).

C. The Conflict of Laws Rule of New York Would Call for the Use of the Local Law of New York in This Case.

The Conflict of Laws rule of New York is to be considered in this case only if this Court believes the doctrine of *renvoi* would be used by the Kentucky court, a conclusion which the preceding subdivision of the brief shows is not the fact.

In New York, the leading case on the subject of applicable choice is *Holley* v. *Talcott*, 129 App. Div. 233 (1st Dept., 1908), where it was held that the interpretation and validity of a contract for the loan of money is to be determined by the law of the place where the contract was made. The Court decided, therefore, that since the agreement to loan money took place in New York, the contract was a New York contract though the notes evidencing the transaction were signed and made payable in Pennsylvania, and the question as to whether it was usurious must be determined by the laws of New York, not by that of Pennsylvania.

Nothing to the contrary was held in *Westchester Mortgage Co.* v. *Grand Rapids and Ionia Railroad Co.*, 246 N. Y. 194, cited by the petitioner, for it is clearly dis-

tinguishable on its facts. As was there stated (per Lehman, *J.*):

> "Unquestionably the note is usurious if it was made in the State of New York, and is governed by the laws of this State. The Appellate Division has made findings and conclusions to the effect that the note was made and delivered in Rhode Island, and its validity must be determined by the laws of that State" (p. 197).

Distinguishable, too, as involving a contract made elsewhere than in the State of New York, is the case of *Curtis* v. *Leavitt*, 15 N. Y. 9, upon which the petitioner relies. At page 227 of the opinion there we find the following:

> "The documentary and oral evidence shows that the contract for the sale of these bonds was made and the money advanced on them paid in England; that the semi-annual interest to accrue thereon was to be paid in London, and the principal ultimately to be repaid there. . . . These facts make the contract an English contract; and the question of usury, therefore, is to be determined by the English law."

Even if the petitioner were correct as to the extraordinary liberality of the New York courts in the conflict of laws field as to usury, the doctrine would not apply here. The favorable conflict of laws doctrines in alleged usurious transactions arose to prevent the severe provisions for penalties and forfeiture in cases of usury. The usury prohibitions are statutory, and the court had to deal with their harsh effects as well as it could. But the New York rule against interest on interest involved here is neither a law against usury nor is it a legislative command with harsh sanctions. The New York rule is not a prohibition of usury, but a refusal to enforce a

covenant for interest on interest. It is a prohibition, not imposed by statute, but developed by the New York courts to strike down these provisions for interest on interest after maturity which would consume the debtor's assets and would gravely prejudice other creditors whose claims did not contain such a provision. Surely, the New York courts which created and developed this rule to prevent injustice will not now develop and apply a rule of conflict of laws for the purpose of doing away with this protection. Since New York is certainly the State of the most numerous and most important contacts in this case, it is clear that its courts would not apply a conflict of laws rule that the law of any State having any contact with the transaction may be used for the purpose of escaping the very protection which those same courts have developed.

III.

The considered determination by the Circuit Court of Appeals of the interest on interest question, predicated upon decisions of the New York Court of Appeals, should not be overruled.

The Circuit Court of Appeals in the instant case correctly ascertained the law of New York to be that a covenant made prior to the accrual of interest, to pay interest on interest, is contrary to the public policy of the State and is, therefore, unenforceable.

Relied upon by the Circuit Court of Appeals, among other cases, were two opinions of Judge Cardozo, writing for the Court, in *Continental Securities Co.* v. *N. Y. C. & H. R. Co.*, 217 N. Y. 119, 125:

"It makes no difference that the promise to pay

interest is represented by coupons. Until detached and separately negotiated, a coupon is merely an incident of the bond without greater force than any other promise for the payment of interest. (*Williamsburgh Savings Bank* v. *Town of Solon*, 136 N. Y. 465, 481.)"

And in *Newburger-Morris Co.* v. *Talcott*, 219 N. Y. 505, 510:

"The charge of compound interest was correctly disallowed. The rule is settled that a promise to pay interest upon interest is void if made at a time before simple interest has accrued. (*Young* v. *Hill*, 67 N. Y. 162.) The provision in the contract that interest shall be 'charged on the account current. . . . at the rate of 6 per cent per annum,' must, therefore, mean simple interest. Any other promise, made at the outset of the dealings would be invalid."

After reviewing the New York authorities on the question of interest on interest, the opinion of the Court below in the instant case concludes (R. 226):

"We have found no guidance to decision save in the opinions of the highest court of New York. Upon our rounded view of the opinions of that tribunal, we have concluded that the district court erred in holding that the non-negotiated coupons attached to the first mortgage bonds of the Inland Gas Corporation bear simple interest, at the rate provided in the mortgage, from the respective due dates of the coupons until paid."

In *Huddleston* v. *Dwyer*, 322 U. S. 232, 237, this Court said:

"The decision of the highest court of a state on matters of state law are in general conclusive upon us,

and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts, Cf. *Ruhlin* v. *New York Life Ins. Co., supra.*"

Hence, we respectfully urge that such a considered determination of State law by the Circuit Court of Appeals should not be disturbed.

CONCLUSION.

It is respectfully submitted that the judgments of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1946.

No. 42.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE, - - - - - - - - - - Petitioner,

versus

LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the GREEN COMMITTEE, and MORRIS GREEN, - Respondents.

No. 43.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE, - - - - - - - - - - Petitioner,

versus

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, Et. Al., - - - - - Respondents.

No. 44.

VANHORN BONDHOLDERS PROTECTIVE COMMITTEE, - - - - - - - - - - Petitioner,

versus

LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the GREEN COMMITTEE, and MORRIS GREEN, Et. Al., - Respondents.

No. 45.

VANHORN BONDHOLDERS PROTECTIVE COMMITTEE, - - - - - - - - - - Petitioner,

versus

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, Et. Al., - - - - - Respondents.

BRIEF FOR RESPONDENTS, CARL B. EARLY, ET AL.

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CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, ET AL., - - - - - - - - - - *Respondents.*

BRIEF FOR RESPONDENTS, CARL B. EARLY, ET AL.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 214) is reported 151 F. (2d) 470. The District Court rendered no opinion, but, during argument, stated the grounds for its decision (R. 56) and, thereafter, made an order and judgment embodying findings of fact and conclusions of law (R. 192).

JURISDICTION

The judgments sought to be reviewed were entered October 9, 1945 (R. 213-214), and a timely petition for rehearing (R. 235) was denied November 26, 1945 (R. 241). The petition for certiorari of Vanston Bondholders Protective Committee was filed February 14, 1946, and the petition for certiorari of Van Horn Bondholders Protective Committee was filed February 15, 1946. In each petition for certiorari the jurisdiction of this Court was invoked under §240 of the Judicial Code, as amended, and the petition for certiorari of the Vanston Bondholders Protective Committee also invoked the jurisdiction of this Court under §24(c) of the Bankruptcy Act, as amended. Each of said petitions for writs of certiorari was granted by this Court on March 25, 1946 (R. 241-243).

STATEMENT OF THE CASE

On February 1, 1928, the debtor, Inland Gas Corporation, a Delaware corporation, executed and delivered in the State of New York a deed of trust to Chatham Phenix National Bank & Trust Company and James F. McNamara, Trustees, under which a first lien on all the property of the Inland Gas Corporation therein described, and which consisted of substantially all of its property, was given as security for the payment of an issue of $4,400,000.00 par value of 6½% first mortgage bonds maturing on the first day of February, 1938. The interest on the bonds was represented by coupons attached, payable semi-annually.

The bonds provided that they were payable (R. 197):

> "at the principal office of the Chatham Phenix National Bank and Trust Company, or its successor in trust under the Indenture hereinafter mentioned (hereinafter called the Trustee), in the Borough of Manhattan, City and State of New York, or, at the option of the bearer or such registered owner, at the principal office of the Continental National Bank and Trust Company, in the City of Chicago, State of Illinois."

The coupons provided that they were payable (R. 202):

> "at the principal office of Chatham Phenix National Bank and Trust Company, in the Borough of Manhattan, City and State of New York, or at the option of the bearer, at the principal office

of the Continental National Bank and Trust Company in the City of Chicago, State of Illinois."

The trust indenture securing the bonds and coupons provided for the payment of interest on defaulted bonds and coupons, from their respective due dates until paid, at the same rate as that applicable to the bonds before maturity (R. 204) but there is no such provision in either the bonds or coupons attached thereto.

At the time of the institution of bankruptcy proceedings substantially all of the bonds were past due and unpaid, as is true of the interest coupons which matured after August 1, 1930. The past due coupons have not been detached from the bonds or negotiated to third parties. The record contains no proof that the holders of any of the past-due bonds or coupons exercised their option to require payment thereof in Chicago, Illinois, or that the option was so exercised in respect of any of the bonds or coupons that were actually paid.

Inland Gas Corporation also has outstanding and past due since February 1, 1938, $1,450,000.00 par value of 7% debentures and $400,000.00 par value of 6% second mortgage notes (R. 100). No interest has been paid on the debentures since August 1, 1930, and no interest has been paid on the mortgage notes since January 2, 1930. *The debentures and the second mortgage notes are secured by a second mortgage on the same property embraced in the deed of trust securing the first mortgage bond issue.*

The District Court, on petition by a First Mortgage Bondholders Committee for a distribution upon first

mortgage bonds, ruled that the validity of the provision in the trust indenture for the payment of interest on defaulted interest coupons attached to the first mortgage bonds was controlled by the law of the State of New York, and that under the law of that state the provision was valid. He accordingly ruled that the holders of the bonds and attached coupons were entitled to the payment of the face of the bonds and of the attached coupons and, in addition thereto, to simple interest on the bonds and to simple interest on the past-due coupons from the date of their respective maturities until paid at 6½% per annum. The result of this ruling was to deny the second mortgage holders any substantial recovery whatever on their securities.

On appeal to the Circuit Court of Appeals for the Sixth Circuit, the ruling of the lower court was reversed, the Circuit Court of Appeals holding, as did the District Court, that the validity of the contract to pay interest on past-due coupons must be determined by the law of New York. That Court, however, held that, under the law of New York, the contract to pay interest on the defaulted coupons was against the public policy of that state and void.

QUESTIONS PRESENTED

The contentions advanced in their respective briefs by the petitioners and by the Securities and Exchange Commission are so numerous and involved that they tend to confuse, rather than to clarify, the questions upon which certiorari was sought and granted.

As we understand the case, it presents two questions:

(1) To what jurisdiction was the Bankruptcy Court required to look for the applicable law in determining the validity of the contract here involved?

(2) What is the law of that jurisdiction on the subject?

It is thoroughly settled that under the present bankruptcy law, the validity of the contract here involved is governed by local law. *Benedict, Receiver,* v. *Ratner,* 268 U. S. 353; *Security Mortgage Company* v. *Powers,* 278 U. S. 149. Indeed, the petitioners' briefs impliedly, and the brief of the Commission expressly, admit this to be true. The District Court and the Court of Appeals each held that the law of New York was controlling, but they disagreed as to the effect of that law, the District Court holding that the contract was valid under New York law, and the Circuit Court of Appeals that it was invalid.

The petitioners and the Commission contend: (1) that the law of New York is not controlling; and (2) if it is, the Circuit Court of Appeals was in error in its holding that under that law an agreement to pay interest on past due coupons is against public policy and void. We shall discuss these contentions in the order stated.

ARGUMENT

I. THE LAW OF NEW YORK IS CONTROLLING

Each of the coupons provided that it was payable (R. 202):

> "at the principal office of Chatham Phenix National Bank and Trust Company, in the Borough of Manhattan, City and State of New York, or *at the option of the bearer,* at the principal office of the Continental National Bank and Trust Company in the City of Chicago, State of Illinois." (Emphasis ours.)

It seems clear from the foregoing quoted language of the coupons that the stipulated place for the performance of the contract (payment) was the State of New York, unless and until the option to require payment in Chicago, Illinois, had been exercised. In the bankruptcy proceeding, the holders of the coupons asserted their claim to interest thereon. The allowance of interest was resisted on the ground that the contract providing for the payment thereof was made and to be performed in New York, and under the law of that state was against public policy and void. It would seem that in such situation, if a coupon holder desired to claim that the place of payment of his coupon was Chicago, Illinois, the burden was upon him to show that he had exercised his option to have payment made there. The record contains no such showing in behalf of any coupon holder. Therefore, we insist that for the purpose of testing the validity of the contract here

involved, New York must be regarded as the state in which the contract was executed and to be performed. *Braniff Investment Company, et al.* v. *Norton, et ux.*, 80 F. (2d) 598 (5th Circuit), *certiorari* denied 298 U. S. 663, is directly in point. A citizen of Texas had executed and delivered in that state his promissory note to Braniff Investment Company, an Oklahoma corporation having an office and place of business in Texas. The note provided for its payment "at the office of Braniff Investment Company, Oklahoma City, Oklahoma (or at such place as may be designated by the holder for the time being of this note)." No holder of the note ever exercised the option to require its payment at any place other than in Oklahoma City. Under these facts, the Court, writing through Judge Hutcheson, held that the note fixed Oklahoma City as the definite place of payment and

> "that the clause in parenthesis merely extended to holders the option to change it. Since there was no attempt to exercise the option, we need not consider what the effect would have been had such an attempt been made. As the note stood at the time of its making, and at the time of the trial, the place of payment fixed in it was Oklahoma City."

The petitioners urge (Vanston brief, page 16) that inasmuch as the debtor has been in either federal receivership or in bankruptcy continuously since the maturity of the coupons involved in this litigation, and those coupons still remain uncollected, the holders' option to demand payment in Illinois remains un-

impaired. However, as pointed out by Judge Hutcheson in the *Braniff Investment Company* case, *supra*, the place of payment must be determined as the situation stood at the time of the trial in which the question arose. Furthermore, the record shows, and the petitioners admit (Vanston brief, page 16), that the coupons which matured prior to the receivership proceedings were paid, yet, the record contains no showing that the holders of any coupons exercised their option to require payment in Illinois or that any of them were paid in that state.

It is familiar law that one claiming rights under an option must prove substantial compliance with its terms; and as there is no proof in the record that any holder exercised his option to have payment made in Illinois, we think it should be conclusively presumed that the option has not been so exercised as to any of the coupons. The contract here involved is entirely different from one which fixes *no* place of payment, but leaves that matter to the future determination of either or both of the parties. Of course, in such situation, as argued by the petitioners (Vanston brief, page 16), there is no place of performance until it has been designated by the party authorized so to do. The fallacy of the petitioners' argument on this point is that it proceeds from the false premise that under the contract here involved no place of payment is fixed until the coupon holder exercises his option. The contract here involved definitely fixes the place of payment. The optional provision does no more than give the holder of the securities the right to change the

place of payment. Of course, until he so changed the place of payment, it continued in New York. Certainly, the contract contemplated that bondholders and coupon holders desiring to exercise their option to change the stipulated place of payment should do so in advance of or on maturity dates. Admittedly this was not done up to the time this case was tried and decided. Hence, the contract must be viewed as one made and to be performed in New York. Therefore, it is immaterial whether the Bankruptcy Court applied the choice of law rule prevailing in Kentucky or the Federal choice of law rule, because the rule is the same in each of the two jurisdictions in such a situation. It is universally held that where a contract is made and to be performed in the same state, the law of that state is controlling as to its validity in the absence of an express stipulation to the contrary. Kentucky is thoroughly committed to that rule. *Moody* v. *Barker*, 188 Ky. 401, 222 S. W. 89; *Fry Bros.* v. *Theobald*, 205 Ky. 146, 265 S. W. 498; *Cooper's Adm'r* v. *Lebus' Adm'rs*, 262 Ky. 245, 90 S. W. (2d) 33. We know of no Federal decision to the contrary and counsel have cited none.

Even if it should be conceded that Illinois was an alternative place of performance, the concession does not help the case of petitioners. Certainly, the contract cannot be construed as fixing Illinois as the exclusive place of performance. Viewing the contract in the light most favorable to petitioners, the most that can be said of it is that it provides for its performance in part in New York and in part in Illinois, according

as the holders might, or might not exercise their optional right to designate Illinois as the place of performance. In such a situation, the Illinois court would determine the validity of the contract under the law of New York, the place where the contract was made. *Oakes* v. *Chicago Fire Brick Co.*, 388 Ill. 373, 58 N. E. (2d) 460, seems directly in point. In that case, the Court held that the validity of a contract made in another state, which provides in part for its performance in Illinois and in part in other states, must be determined not by the law of Illinois but by the law of the state where made. That case unequivocally announces the rule that under Illinois law the validity of a contract made in another state will not be determined under the law of Illinois unless the contract provides, or it is made to appear, that the parties intended that it was to be *wholly* performed in Illinois. After stating that the court had decided in the case of *George* v. *Haas*, 311 Ill. 382; 143 N. E. 54, 55, that the validity of a contract made in another state but to be performed in Illinois must be determined by the Illinois law, the court said:

> "To bring the rule anounced in George v. Haas, 311 Ill. 382, 385, 143 N. E. 54, into operation, it was incumbent upon appellant to show that the agreement was to be performed wholly within this State. Where a contract is to be performed in various States, as in this case, the *lex loci contractus* must control. Otherwise, if the place of performance is to govern, the law would find itself in a hopeless tangle."

This case also answers the intimation of adversary counsel in their briefs to the effect that the place of performance of the contract here involved is yet to be determined. Of course, such contention is wholly unjustified, as we have heretofore shown, but assuming it to be sound, the Illinois case just cited is fatal to the contention that the contract's validity must be determined by Illinois law, for in that case, and immediately following the language quoted above, the court said:

> "Where there is nothing in the contract or in the proof to show ~~whether~~ the contract is to be performed, it is governed by the law of the place where made."

If we have correctly understood the briefs of the petitioners and of the Commission, it is their contention that, even if it be conceded, as contended by us, that the contract was made and to be performed in New York, it does not follow that the law of that state is controlling as to its validity. They argue that it must be presumed that the parties did not intend to make a void contract, and if the contract would be valid under the laws of any state having a normal and vital relation to the contract (claimed by them to be Illinois, Kentucky and Delaware), or in any state in which the contract could have been put in suit but for bankruptcy (claimed by them to be Kentucky and Delaware), it should be presumed that the parties intended the law of that state to be controlling if such presumption is necessary to save the validity of the contract.

Respectable authority may be found for the proposition that parties to a contract may *by express stipulation* provide that the law of some state other than that where the contract was made or to be performed shall control, provided the state agreed upon has a normal and vital relation to the contract. Where the state agreed upon, however, is neither that of the contract's execution nor of its performance, it must appear that it has an actual and substantial relation to some important element of the contract. Thus, the court refused to enforce a stipulation in a contract that all the rights thereunder should be governed as to validity, interpretation, construction and effect, by the law of the state in which one of the parties was incorporated, that state being neither the state of the contract's execution nor of its performance, for the reason that it had no normal or vital relation to the transaction. *Brierley* v. *Commercial Credit Co.*, 43 F. (2d) 730 (3d Cir.), *certiorari* denied 282 U. S. 897; *Gerli & Co.* v. *Cunard SS Co.*, 48 F. (2d) 115 (2d Cir.); *Owens* v. *Hagenbeck-Wallace Shows Co.* (R. I.), 192 Atl. 158, 464, 112 A. L. R. 113. As the contract under consideration contained no such express stipulation as to the governing state law, the rule just adverted to has no application here.

The authorities, including Kentucky, also are to the effect that where a contract is made in one state and to be performed in another, and is valid under the law of one, but invalid under the law of the other, and there is no express stipulation as to which law shall control, it will be presumed that they contracted with

reference to the law of the state which recognizes the validity of the contract, and the contract will be enforced provided enforcement would not be against the public policy of the state of the forum.

However, we know of no case, state or Federal, holding that the court should presume, in the absence of an express agreement, that the parties intended to contract in respect of the law of a state which was neither the state of the making nor of the performance of the contract, even though such state has a normal and substantial relation to the transaction. The petitioners (Vanston brief, page 13) and the Commission (brief, page), cite *Seeman* v. *Philadelphia Warehouse Company,* 274 U. S. 403; *Cromwell* v. *County of Sac,* 96 U. S. 51; *Smith* v. *Western & Southern Life Ins. Co.,* 87 F. (2d) 830 (C. C. A. 5th); *Joffe* v. *Bonn,* 14 F. (2d) 50 (C. C. A. 3d); *Brierley* v. *Commercial Credit Co.,* 43 F. (2d) 724 (E. D. Pa.), aff'd 43 F. (2d) 730 (C. C. A. 3d), cert. denied, 202 U. S. 897; *Braniff Investment Co.* v. *Morton,* 80 F. (2d) 598 (C. C. A. 5th), cert. denied 298 U. S. 663, *supra; Merchants' & Manufacturers' Securities Co* v. *Johnson,* 69 F. (2d) 940 (C. C. A. 8th), cert. denied 293 U. S. 569; *In re: Champion Shoe Machinery Co.,* 17 F. Supp. 985 (E. D. Mo.). None of those case announces any such rule. In each of them, including the case of *Seeman* v. *Philadelphia Warehouse Company, supra,* the court was dealing only with the choice of law as between the state of the making and the state of the performance of the contract. Therefore, none of those

cases can be accepted as authority for the sweeping *assumed intent rule* contended for by our adversaries.

Petitioners assert (Vanston brief, page 20) that the rule contended for is recognized and followed in New York, and cite *Westchester Mortgage Co.* v. *Grand Rapids & Ionia Railroad Co.*, 246 N. Y. 194; *Curtis* v. *Leavitt*, 15 N. Y. 9, 227; and *Chapman* v. *Robertson*, 6 Paige 627. It is stated that the Circuit Court of Appeals in determining the law of New York entirely overlooked those cases and the principle announced by them. However, those cases no more support the contention of petitioners than do *Seeman* v. *Philadelphia Warehouse Company, supra,* and the other cases relied upon by the petitioners and the Commission. As in the *Seeman* case, *supra,* and the other cases just referred to, the court was dealing only with the choice of law as between the state of the making and the state of the performance of the contract.

II. UNDER THE NEW YORK DECISIONS, THE CONTRACT HERE INVOLVED WAS AGAINST THE PUBLIC POLICY OF THAT STATE AND VOID

Apparently, the petitioners and the Commission concede that under the New York decisions an agreement made contemporaneously with the creation of a debt to pay technical compound interest on unpaid interest installments after their maturity date is against the public policy of New York and void, but that a contract made contemporaneously with the creation of a debt to pay simple interest on such overdue interest in-

stallments is valid and enforceable under the law of New York. Unfortunately for them, they have not, and cannot, cite a single New York case in support of their contention. As we shall presently show, the New York courts, almost from the beginning of statehood down to their most recent utterance on the subject, have condemned agreements made contemporaneously with the creation of a debt to pay interest on interest installments after their maturity date, as against the public policy of the state and void, and this without regard to whether the agreement contemplated the payment of compound interest in the technical sense, or simple interest. The briefs of the petitioners and of the Commission contain no independent analysis or discussion of any of the New York cases. They are content to rely upon the analysis of those cases made by District Judge Patterson (now Secretary of War) in *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Company,* 26 F. Supp. 954. Inasmuch as Judge Patterson's opinion in that case contains a somewhat extended analysis and discussion of many of the New York cases upon which we rely and which we shall presently discuss, and inasmuch as we shall attempt in our discussion of those cases to show that Judge Patterson's conclusions and criticisms are not justified by the cases themselves, we believe it will be for the convenience of the Court and will avoid repetition to first consider the Patterson opinion.

Judge Patterson had before him the validity of a covenant in a deed of trust executed to secure an issue

of first mortgage coupon notes to the effect that the notes, and also any overdue coupons, should draw interest at 7% per annum after maturity. Judge Julian W. Mack, Circuit Judge, sitting as a District Judge in the same case, had considered the validity and effect of the same covenant in respect of the same mortgage coupon notes prior to Judge Patterson's decision. The question was considered and decided by Judge Mack in 1935 prior to the decision of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64. A receiver had been appointed for the Interborough Rapid Transit Company of New York and the trustee under the deed of trust executed to secure the notes and coupons had intervened and asked the instruction of the court as to whether under the covenant above referred to interest should be paid on overdue coupons after their maturity date. Judge Mack in his opinion (11 Fed. Supp. 418) said:

> "But, under New York law, the indenture provision for interest after maturity on the other two classes of interest coupons is unenforceable, as violative of the public policy of that state. Williamsburgh Savings Bank v. Town of Solon, 136 N. Y. 465, 32 N. E. 1058 (1893); Bailey v. County of Buchanan, 115 N. Y. 297, 22 N. E. 155, 6 L. R. A. 562 (1889); Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99 (1876). The question therefore as to them is whether New York law is applicable.
>
> "Despite my personal views that state law ought to control contractual obligations made and payable in the state, especially in a case in the federal court dependent for jurisdiction on di-

versity of citizenship, the law is well established since Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (1842), especially as to commercial paper, that a federal court in the absence of a controlling state statute applies what it may find to be the general commercial law in this country, irrespective of the decisions of the state court. Nor does the fact that the state decisions are based on what they deem to be the public policy or fixed public usage of the state change the situation. * * *

"Although the New York rule is not binding on this court, it would nevertheless be followed if there were any real conflict in the federal decisions, because, as happily phrased by Mr. Justice Cardoza in Mutual Life Ins. Co. v. Johnson, 293 U. S. 335, 55 S. Ct. 154, 156, 79 L. Ed. 398 (1934), 'the *summum jus* of power whatever it may be, will be subordinated at times to a benign and prudent comity. * * *' On the question here to be decided, however, the courts of the nation have spoken in no uncertain terms; the issue, far from being 'balanced with doubt,' has been resolved, with but a single exception, in a manner contrary to the New York decisions."

The foregoing quotation from Judge Mack's opinion discloses beyond question that he construed and understood the New York decisions as holding that such contracts as the one under consideration, to pay simple interest on interest coupons after their maturity, were against the public policy of that state and void. It is equally clear that the only reason he did not follow those decisions was because at that time, under the authority of *Swift* v. *Tyson*, 16 Pet. 1, 10 L. Ed. 865, he

could not do so in view of controlling contrary decisions on the subject by the Supreme Court of the United States.

On the strength of Judge Mack's opinion the trustee paid interest on the past due coupons until after the decision in *Erie Railroad Co.* v. *Tompkins, supra,* on April 25, 1938. Following that decision the trustee petitioned the court, District Judge Patterson presiding, for instructions in respect of future payments of interest on past due coupons, and it was in this situation that Judge Patterson wrote his opinion in 26 F. Supp. 954, so greatly relied upon by petitioners and the Commission.

Judge Patterson held that the decisions of the New York courts were to the effect that an agreement to pay compound interest on overdue installments of interest on an indebtedness created contemporaneously with the contracting of the indebtedness is void as against the public policy of that state, but that the courts of that state had never held that a contract made at the time of the creation of the indebtedness for the payment of simple interest on the overdue installments of interest was void as against public policy. In this connection, he stated:

> "While general statements may be found in New York cases to the effect that an agreement to pay 'interest on interest' is invalid, the fact is that the agreements under discussion were agreements to pay compound interest. In my opinion the cases dealing with agreements for compound interest do not touch the present case."

He further found the New York cases inapplicable because they were not dealing with cases in which there was a promise, made at the time of the loan, to pay simple interest on overdue interest installments or coupons. In this connection he said:

> "It thus appears that the New York courts have not rendered a decision on the validity of a covenant by a borrowing corporation to pay simple interest on overdue coupons. The argument for invalidity rests on the cases dealing with agreements for compound interest. But the reasons that led the New York courts long ago to condemn agreements for compound interest have only a remote bearing on agreements for simple interest on overdue coupons. On the other hand, there are strong reasons for concluding that a covenant to pay simple interest on overdue coupons is valid in New York. If there were a public policy against the allowance of such interest, the court in the Williamsburg case would hardly have sanctioned recovery of interest on a coupon held by one who did not hold the bond, where there was not even a covenant to pay such interest."

The New York cases do not sustain the analysis, nor justify the differentiation, undertaken to be made by Judge Patterson in his opinion.

From the very beginning of statehood the New York courts have taken the position that a covenant made in advance of the accrual of interest, to pay interest thereon from the date of accrual, is against public policy and void, and the opinions of the New York courts unmistakably disclose that no distinction was

made or intended to be made between true compound interest and simple interest on interest. The New York courts have used the terms interchangeably. The vice condemned was not the compounding of interest in the technical sense, but the collection of interest on interest which, in a measure, is compounding interest. The difference is one of degree and not of kind. At the time the New York courts adopted the rule, the same rule prevailed in England; and as shown by the opinions of the New York courts, the English opinions undoubtedly had their effect in shaping the policy of New York. The New York courts have been careful to point out that their decisions are not based upon the theory that interest upon interest is usury, but solely on the ground that such contracts are oppressive and therefore against the public policy of that state.

One of the first reported cases on the subject is that of *State of Connecticut* v. *Jackson*, 1 Johns. Ch. 13, decided in 1814. In this case there was involved a bond for $25,000.00 due in a stipulated number of years after date with interest from date until paid. Payments had been made on the obligation from time to time, and the matter was referred to a master to state the account and ascertain the amount due. In most, if not all, instances the payment made was less than the interest on the principal which had accrued to the date of payment. The master, in stating the account, computed the interest to the date of payment, added same to the principal, and then deducted therefrom the amount of the payment, and on the remainder (which, of course, included some interest) he com-

puted interest to the date of the next payment, and so on, to the date of the last payment.

The court held that the method followed by the master was incorrect; that the correct rule in such situations is that if the payment exceeds the interest on the principal to the date of payment, the payment must first be applied to the discharge of the interest then due and the surplus used to reduce the amount of the principal, and that subsequent interest is to be computed only on the balance of the principal then remaining unpaid; that if a payment is less than the interest, then the interest continues on the former principal until the payments in the aggregate equal or exceed the interest so computed, at which time the aggregate of the payments is applied to the payment of the interest then due, and any surplus remaining, to the reduction of principal, on which subsequent interest is calculated.

While the method used by the master in that case resulted in compound interest, and while that was the specific question under consideration by the court, the public policy announced by the court was not confined to a condemnation of compound interest in its technical sense. The court said:

> "This allowance of compound interest is not admissible, and the report must be sent back to the master for correction. There are cases in which interest is considered as changed into principal, and permitted to carry interest; as where a settlement of accounts takes place after interest has become due, or an agreement is then made that the interest due shall carry interest, or the

principal and interest are computed in a master's report and the same is confirmed. But, except in some special cases, *interest upon interest is not allowed, and the uniform course of the decisions is against it as being a hard and oppressive exaction, and tending to usury.*" (Emphasis ours.)

The emphasized language would seem to make it abundantly clear that the court was not thinking of compound interest in its technical sense, but as interest upon interest; but if it be thought that the use of that language was not necessary to a decision of that particular case, nevertheless, the language is important when we are trying to determine the attitude of the courts of New York on the question of the collection of interest upon interest.

The next sentence in the opinion, while not necessary to a decision of that case, demonstrates that the New York courts, as early as 1814 (the opinion of Judge Patterson to the contrary), regarded contracts made in advance of the accrual of interest, to pay simple interest thereon from the date of accrual, as against public policy and unenforceable. The court said:

> "Even an original agreement, at the time of the loan or contract, that if interest be not paid at the end of the year it shall be deemed principal, and carry interest, will not be recognized as valid. Such a provision would not amount to usury, so as to render the contract connected with it illegal and void in law; but this Court certainly, and perhaps, a court of law, would not give effect to such a provision."

It may be argued that in using the above quoted language the court had in mind the adding of interest to the original principal and the collection of interest on the resulting amount, but such is not the necessary import of the language. It is just as reasonable to conclude that the court meant to say that parties could not contract, in advance of the accrual of interest, that upon such accrual the amount so accrued should be treated as a principal sum and carry interest thenceforth.

In 1822 the New York Chancery Court (Chancellor Kent) decided the case of *M. & J. Van Benschooten* v. *Lawson*, 6 Johns. Ch. 313. There was involved in that case an agreement made after the accrual of interest to pay interest thereon back to the date that interest installment became due. While the opinion of the court refers to the agreement as one to pay compound interest, the facts as disclosed by the opinion unmistakably show that it was dealing with an agreement for the payment of simple interest on interest. The agreement was thus described by the court:

> "It was agreed on the 27th day of May, 1817, to allow interest for the year preceding on the interest which was due the year preceding."

The statement of facts preceding the opinion was in the following language:

> "Bill to foreclose a mortgage given on the 12th day of May, 1819 to secure the payment of a bond conditioned to pay $9,026.87 on the 12th day of May, 1820, with interest.

"It appeared in proof that this bond and mortgage was given for the balance of two prior bonds, the one dated May 2, 1814, for $4,750.00, payable the first day of May, 1815, with interest, and the other dated 27th of May, 1817, for $737.00 given for the arrears of interest remaining unpaid on the prior bond; and that on giving this last bond for $737.00, interest on the previous interest remaining unpaid was calculated for the year it had remained due and unpaid and was included, which compound interest amounted to $29.42.

"It appeared also that a judgment bond was taken on the 24th day of April, 1821, for $966.65, being for arrears of interest on the bond and mortgage on which this Bill is founded and that $24.87 of unpaid interest on interest which had remained due and unpaid was also included in this judgment bond which had been assigned by the plaintiffs to a third party.

"The case was submitted upon the pleadings and proof, whether these charges of compound interest were admissible."

It is apparent from the foregoing statement that the two questioned items of $29.42 and $24.87 were not true compound interest but simple interest on unpaid installments of interest. Nevertheless, note this language of the court:

"Compound interest can only be admitted on the fact of a written agreement made *after* the interest upon which the agreement operates has fallen due; and to give such an agreement a retrospective effect leads to oppression. It is equally

objectionable, *after an agreement made at the time of the original contract or loan, that compound interest shall begin and run upon the lawful interest the moment it falls due, whether payable yearly, half yearly or quarterly; and such agreements are held to be oppressive* * * *. If the creditor was permitted to exact from the debtor a stipulation to pay interest on arrears of interest then due, it would lead to great and inevitable abuse. It would, perhaps, be less mischievous, because the parties would stand upon more equal terms, to allow of such a stipulation for compound interest, when the original contract is about to be made, the parties are then independent of each other; but in the other case the debtor is comparatively dependent, and probably distressed, and the creditor exacts the stipulation under the evident advantage of power and superiority. The agreement on the part of the defendant, to pay compound interest retrospectively, does not alter the case." (Emphasis ours.)

The court disallowed both of the items of interest on interest.

Mowry v. *Bishop*, 5 Paige's Ch. 98, was decided in 1835. The court in that case pointed out that while under the law of most of the states it is perfectly legal to make a contract at the time of the creation of a debt to pay interest on interest installments from their due date, such a contract is not valid in New York. The court said:

"In this state it appears to be settled that an agreement to pay interest on interest which may accrue after the making of such an agreement,

cannot be legally enforced, although it does not render the agreement usurious. This principle is merely adopted as a rule of public policy to prevent an accumulation of compound interest in favor of negligent creditors who do not call for the payment of their interest as it becomes due."

Toll v. *Hiller,* 11 Paige's Ch. 228, was decided in 1844. The question involved was the allowance of interest upon past due installments of interest. The chancellor held that while he could see no equitable reason why unpaid annual installments of interest on a debt which was to run several years should not bear interest from maturity, nevertheless, under the law of New York, this was not allowed. He said:

"It may be proper to say, however, that as the interest was, by the condition of the bond and mortgage, to be paid annually, it would be perfectly equitable to receive interest on such interest from the time it was payable; although for special reasons of policy, courts will not allow interest upon interest unless there is a special agreement to pay interest thereon after the original interest has become due and payable."

Forman v. *Forman,* 17 Howard's Practice Rep. 255 (New York Supreme Court), was decided in 1859. The opinion in part reads as follows:

"I know of no principle or adjudged case that authorizes the recovery of compound interest in an action at law unless there has been a promise in writing to pay interest after it could be said to be morally due, or without proof of some peculiar facts not established in this case."

Stewart v. *Petrie,* 55 N. Y. 621, was decided in 1874. In this case a mortgage by its terms was to run for several years with interest payable annually. The mortgage, as well as the interest, was past due. Upon the institution of foreclosure proceedings an agreement was entered into to extend the time of the payment of the mortgage provided the mortgagor would pay interest on the arrears of interest. This agreement was attacked solely on the ground that it violated the New York usury statute, and while that was the only question necessary to be decided, the case is of vital importance because it contains an expression of opinion by the court of last resort of New York as to the validity of agreements, made at the time a debt is created, to pay interest on defaulted installments of interest. The court said:

> "The only defense interposed was usury upon the ground that the note was given for interest upon arrears of interest, or compound interest on a mortgage long past due, held by the payee of the note, the payment of which was further extended upon receipt of the note. There was no conflict in the evidence of any disputed fact; and there was no request by the defendant to go to the jury on the question of intent, or whether the transaction was colorable and intended as an evasion of the law prohibiting the taking of usury. The receiving of interest upon interest is not a violation of the statute of usury, as no more than seven per cent is in such cases taken or received. *It is true that an agreement in advance for the payment of interest upon interest after the same shall accrue can not be enforced, not because it is*

usurious but for the reason that such an agreement is regarded in this state as against public policy—as one that may be made oppressive to the debtor; but a prospective agreement, after the interest has accrued, to pay interest thereon is valid and money paid for compound interest can not be recovered back." (Emphasis ours.)

From the emphasized language quoted above, it will be observed that the New York court again failed to make any distinction between true compound interest and interest upon interest.

Young v. *Hill*, 67 N. Y. 162, was decided in 1876. That case involved the right to charge true compound interest retrospectively under an alleged agreement made after default in the payment of simple interest on the obligation. The court held that such an agreement would not be enforced. Judge Patterson, in his opinion in the *American Brake Shoe & Foundry Company* case, *supra*, rather tentatively suggested that this case supports his view that the New York cases have not condemned contracts to pay simple interest on past due installments of interest, and cites the following language of the opinion in support thereof:

> "An agreement to pay simple interest upon the several installments of interest as they become due, and a computation based upon such agreement applying the payments as made first to the payment of interest until all was paid, might not be unreasonable or inequitable."

That language falls far short, however, of holding that such contracts would be enforceable in New York.

When we consider the prior decisions of the New York courts hereinbefore referred to, and many of which are cited and relied upon in the case of *Young* v. *Hill*, as well as language of the opinion which preceded the language quoted by Judge Patterson, we submit that there is no basis whatever for believing that that case was intended to announce any rule different from that theretofore consistently followed by the New York courts. We call attention to the following language of the opinion preceding the language quoted by Judge Patterson:

> "When, by the terms of an obligation, interest is payable at stated periods, interest upon interest from the time it becomes due, only gives the creditor the usual and legal equivalent for the non-payment of money payable at a day certain, and in some States recovery may be had of interest upon interest under such circumstances without a special contract to that effect. With us it is not allowed. Two propositions are definitely settled by adjudication: first, that an *agreement to pay interest upon interest must, in order to its validity, be made after the interest which is to bear interest has become due*, and, second, that it must be supported by a sufficient consideration." (Emphasis ours.)

Thus we again find the New York Court declaring that not only agreements to pay compound interest on past due installments of interest are against the public policy of New York, but that an agreement to pay interest upon interest made at the time the debt is created is against the public policy of that state.

Chronologically the next case which should be considered in determining the law of New York applicable to the issue here involved is that of *Bailey* v. *Buchanan County*, 115 N. Y. 297, 22 N. E. 155 (decided in 1889). That case is the foundation for the rule in New York that interest coupons attached to bonds, until detached *and separately negotiated* constitute a part of the bond, and that they give the owner of the bond no greater right than the stipulation in the bond itself to pay interest. In that case the holder of certain coupon bonds was contending that he could not be required to surrender his bonds and all of its coupons for redemption upon the payment of the redemption price together with interest on the face of the bonds to the date of redemption, notwithstanding the interest paid at redemption included that represented by past due coupons. His contention was that the coupons were in the nature of independent negotiable instruments and upon failure to pay them when due, he was entitled to interest on those coupons. The lower court sustained the contention of the bondholder, but on appeal the Court of Appeals of New York reversed. The Appellate Court said:

> "It was held at the general term that the coupons past due and detached from the bonds at the time of the tender were independent negotiable instruments, and that the defendant therefore had no right to demand their surrender for payment as a condition of the payment of the bonds, and that the tender was not good, because it was not an unqualified offer to pay the bonds and the interest thereon for the month of July. We are of

opinion that the learned general term fell into error. It is true that past-due coupons payable to bearer, when detached from the bonds, are for many purposes independent, separate instruments. They may be negotiated, and may be sued upon by the holder without the production of the bonds. Murray v. Lardner, 2 Wall. 110; City v. Lamson, 9 Wall. 477; City of Lexington v. Butler, 14 Wall. 289; Clark v. Iowa City, 20 Wall. 583; Amy v. Dubuque, 98 U. S. 470; Evertson v. Bank, 66 N. Y. 14; McClelland v. Railroad Co., 110 N. Y. 469, 18 N. E. Rep. 237. But the coupons, nevertheless, always have some relation to the bonds. Their force and effect and character may be determined by reference to the bonds. They are secured by the same mortgage, and, although unsealed, are specialties like the bonds, and are governed by the same statute of limitations which is applicable to the bonds. Until negotiated, or used in some way, they serve no independent purpose; and while they are in the hands of the holder they remain mere incidents of the bonds, and have no greater or other force or effect than the stipulation for the payment of interest contained in the bonds; and while they remain in the ownership and possession of the owner and holder of the bonds it can make no difference whether they are attached to or detached from the bonds, as they are then mere evidence of the indebtedness for the interest stipulated in the bonds."

In 1893 the Court of Appeals of New York decided the case of *Williamsburgh Savings Bank* v. *Town of Solon*, 136 N. Y. 465, 32 N. E. 1058. There was involved in that case the right to collect interest on past

due interest coupons in the hands of the holder of the bonds to which they were attached. There was no covenant in the deed of trust securing the bonds, nor in the bonds or coupons themselves, that interest would be paid on past due coupons. The lower court allowed interest on the past due coupons, but the Court of Appeals of New York reversed the lower court on this point, using the following language:

> "But there is a remaining question open for consideration, and that is the allowance of interest upon the coupons from their date. It results in an award of compound interest, which we have held not to be recoverable, except upon some new and independent agreement, made upon sufficient consideration. Young v. Hill, 67 N. Y. 162. The inquiry here is, of course, whether the coupons sued come within that exception, and the solution of the problem depends upon their nature. We have already, in this court, determined what they are, and described their character and quality. In Bailey v. County of Buchanan, 115 N. Y. 297, 22 N. E. Rep. 155, Earl, J., said that while it was true that past-due coupons, payable to bearer, when detached from the bonds, are for many purposes separate and independent instruments, which may be negotiated and sued upon without the production of the bonds, yet such coupons always have some relation to the bonds; that, until negotiated or used in some way, they serve no independent purpose; that, while they are in the hands of the holder, they remain mere incidents of the bonds, and have no greater force or effect than the stipulation for the payment of interest contained in the bonds; and that, while they continue in such own-

ership and possession, it can make no difference whether they are attached or detached, as they are then mere evidences of the indebtedness for the interest stipulated in the bonds. I think that adjudication concludes us, and a re-examination of the question in the light of the very full and able discussion in the present case only strengthens the conclusion then reached, in which we all concurred. Interest, as a rule, follows the principal, without becoming principal, and cannot be compounded by force, merely, of the contract; but that general rule has been modified somewhat by an exception growing out of the character and purpose of interest coupons. They may become separate and independent instruments. When they do, the exception is for the first time needed, and for the first time applies. Until they do, the promise is merely to pay interest, and is governed by the usual rule. They do not become separate and independent instruments until they are utilized as such. Before that occurs, and while they remain in the hands of the holder of the bonds, the occasion for the exception has not arisen, and the exception does not apply. That is plaintiff's situation. It is true it was prevented from suing by an injunction, but the damages occasioned by it are awarded on its dissolution, and theoretically at least, cover all losses thereby sustained. It follows, therefore, that the judgment for the plaintiff was erroneous to the extent of its award of interest upon the coupons, and should be modified by deducting therefrom the sum of $4,244.52, and, as modified, be affirmed, without costs to either party in this court."

Notwithstanding the statement of Judge Patterson in the *American Brake Shoe & Foundry Company* case, *supra*, that none of the New York cases involved simple interest on interest, we submit that the quoted language shows that that is all that was involved in the *Williamsburgh Savings Bank* case; yet the New York court again refers to the interest on coupons as compound interest. This case reaffirms the doctrine laid down in the case of *Bailey* v. *Buchanan County*, 115 N. Y. 297, 22 N. E. 155, that interest coupons can not be regarded as independent negotiable instruments entitled to draw interest from maturity, unless they have been detached from the bond and negotiated; and that unless they have been so detached and separately negotiated they are in exactly the same class as any other ordinary unpaid interest installment. Judge Patterson in his opinion calls attention to the fact that the deed of trust in the *Williamsburgh Savings Bank* case contained no provision for the payment of interest on past due interest coupons, and intimates that had such a provision been incorporated in the deed of trust the result in that case would have been different. A moment's reflection will demonstrate the fallacy of the suggestion. Not only that case held, but every New York case on the subject preceding it had held, that it is against the public policy of New York to permit the collection of interest on interest. Can it be imagined that the parties by contract could defeat such public policy? The question answers itself.

The fact that the New York courts are firmly committed to the doctrine that past due interest coupons

occupy no higher position, under New York law, than any other past due interest installment, unless detached and separately negotiated, is further evidenced by *Continental Securities Co.* v. *New York Central & H. Railroad Co.*, 217 N. Y. 119, 111 N. E. 484, 486. Judge Cardoza, writing for the court, said:

> "It makes no difference that the promise to pay interest is represented by coupons. Until detached and separately negotiated, a coupon is merely an incident of the bond without greater force than any other promise for the payment of interest. Williamsburgh Savings Bank v. Town of Solon, 136 N. Y. 465, 481, 32 N. E. 1058."

In *Newburger-Morris Co.* v. *Talcott*, 219 N. Y. 505, 114 N. E. 846 (decided in 1916), there was involved a contract between a principal and its factor under the terms of which the principal was to consign to the factor goods which it then owned or thereafter acquired, and the factor was to sell them and collect the purchase price and to settle with his principal at stated intervals. Pending such settlements he agreed to make advances to the principal based upon the net cost of the merchandise and upon the outstanding accounts for merchandise sold. He was to receive a certain commission on merchandise sold and interest on the advances made by him. In his statements to his principal he had compounded the interest on his advances. Judge Cardoza wrote the opinion of the court, and while the right to so compound interest was the question in the case, the opinion shows what that eminent New York lawyer understood to be the law of that state in respect of con-

tracts for the payment of interest on past due installments of interest. He said:

> "The charge of compound interest was correctly disallowed. The rule is settled that a promise to pay interest upon interest is void if made at a time before simple interest has accrued. Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99. The provision in the contract that interest shall be 'charged on the account current * * * at the rate of six per cent per annum' must therefore mean simple interest. Any other promise, made at the outset of the dealings, would be invalid."

In *Chase National Bank* v. *Clark Henry Corp.*, 156 Misc. 767, decided by the New York Supreme Court, there was involved the validity of an agreement, contained in a trust indenture executed to secure an issue of bonds, to pay interest on overdue principal and overdue installments of interest, almost identical in language with the provision under consideration in the case at bar. The referee, to whom the case had been referred, in a written opinion rejected the claim for interest on past due installments of interest on the ground that it was against the public policy of New York, and he cited in support thereof a great many of the New York cases which we have analyzed in this brief, and the Supreme Court ratified his opinion and entered a judgment denying interest on past due interest coupons.

In view of the unbroken line of New York cases from 1814 down to the present time, it is difficult to understand how Judge Patterson reached the conclu-

sion he did in the *American Brake Shoe & Foundry Company* case, *supra,* unless he was unconsciously swayed by his conviction of what the law on the subject ought to be. The diligence of counsel has not resulted in the petitioners and the Commission finding any reported cases, state or Federal, agreeing with Judge Patterson's analysis of the purport of the New York decisions, except the single case of *In re Realty Associates Securities Corporation,* 66 F. Supp. 416 (District Court, Eastern District of New York). In that case, District Judge Moscowitz did agree with Judge Patterson in his analysis of the New York cases, but his discussion of the matter covered less than one printed page and upon reading same, it is perfectly apparent he decided the question as he did largely in reliance upon Judge Patterson's opinion.

As we have heretofore shown, Judge Julian W. Mack wholly disagreed with Judge Patterson on the meaning and effect of the New York decisions. The question of what the law of New York is on the subject was also before the Circuit Court of Appeals for the 6th Circuit in *In re Columbus S. H. & H. R. Co.,* 109 Fed. 177; the Southern District of New York (District Judge Clancy), in *Transbel Inv. Co.* v. *Roth,* 36 F. Supp. 396, decided in 1940; and the District Court of Minnesota in *In re Wisconsin Cent. Ry. Co.,* 63 F. Supp. 151, decided in 1945; and after a thorough consideration and analysis of substantially the same cases considered and analyzed in this brief and in Judge Patterson's opinion, each of those courts reached the conclusion that under those decisions a contract made

at the time a debt is contracted to pay interest on an interest installment after its maturity is against the public policy of New York and void. We especially commend to the careful consideration of the Court the painstaking analysis of the New York decisions contained in the opinion of Judge Nordbye in *In re Wisconsin Cent. Ry. Co., supra.*

At page 25 of the brief of the Vanston Committee and at page 3 of the Van Horn Committee's brief, it is argued that the defense of illegality of the contract here involved is not available for the reason that under Section 374 of the General Business Law of the State of New York, a corporation may not interpose the defense of usury in any action. Of course, there is no merit whatever in this contention. We do not contend that the contract here involved is void on the ground that it violates the usury laws of New York. Usury consists of charging or collecting a greater rate of interest than is permitted by law. The objection to the contract here is that it provides for the payment of *any* interest on interest. Three of the New York decisions analyzed by us in this brief make it clear that such contracts are not condemned because they are usurious, but because they are against the general public policy of the state.

For the convenience of the Court, we repeat earlier quotations in this brief from those three cases on that subject:

> "In this state it appears to be settled that an agreement to pay interest on interest which may accrue after the making of such an agreement,

can not be legally enforced, *although it does not render the agreement usurious.*" (Emphasis ours.)

Mowry v. *Bishop,* 5 Paige's Ch. 98, *supra.*

"It is true that an agreement in advance for the payment of interest upon interest after the same shall accrue cannot be enforced, *not because it is usurious* but for the reason that such an agreement is regarded in this state as against public policy—as one that may be made oppressive to the debtor * * *." (Emphasis ours.)

Stewart v. *Petrie,* 55 N. Y. 621, *supra.*

"Even an original agreement, at the time of the loan or contract, that if interest be not paid at the end of the year it shall be deemed principal, and carry interest, will not be recognized as valid. Such a provision would not amount to usury, so as to render the contract connected with it illegal and void in law; but this Court certainly, and perhaps, a court of law, would not give effect to such a provision."

State of Connecticut v. *Jackson,* 1 Johns. Ch. 13, *supra.*

In conclusion, we wish to suggest that the equities of this case are with the second-mortgage holders. We fully recognize that if the first-mortgage bondholders, as a matter of law, are clearly entitled to receive interest on the past due coupons, they cannot be deprived of that right because of the hardship its enforcement will visit upon the holders of the second-mortgage securities. On the other hand, if there is any substantial doubt as to their legal right to receive such interest, it

should be resolved against them. The record shows, as will doubtless be admitted, that the first-mortgage bondholders are certain of receiving the face amount of all their bonds, the face amount of all their coupons, and interest on the face amount of their bonds at the stipulated rate until they are paid. If, in addition, they receive interest on their coupons, there will be nothing left for the holders of the second-mortgage securities. In this situation, the first-mortgage bondholders should not be permitted to pick the carcass clean, unless the applicable law unmistakably commands such a result.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1946

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE, PETITIONER

v.

LOUIS A. GREEN AND ROBERT HEILBRUNN, KNOWN IN THESE PROCEEDINGS AS THE GREEN COMMITTEE AND MORRIS GREEN

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE, PETITIONER

v.

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, ET AL.

VANHORN BONDHOLDERS PROTECTIVE COMMITTEE, PETITIONER

v.

LOUIS A. GREEN AND ROBERT HEILBRUNN, KNOWN IN THESE PROCEEDINGS AS THE GREEN COMMITTEE AND MORRIS GREEN

VANHORN BONDHOLDERS PROTECTIVE COMMITTEE, PETITIONERS

v.

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 42

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE, PETITIONER

v.

LOUIS A. GREEN AND ROBERT HEILBRUNN, KNOWN IN THESE PROCEEDINGS AS THE GREEN COMMITTEE AND MORRIS GREEN

No. 43

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE, PETITIONER

v.

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, ET AL.

No. 44

VANHORN BONDHOLDERS PROTECTIVE COMMITTEE, PETITIONER

v.

LOUIS A. GREEN AND ROBERT HEILBRUNN, KNOWN IN THESE PROCEEDINGS AS THE GREEN COMMITTEE AND MORRIS GREEN

No. 45

VANHORN BONDHOLDERS PROTECTIVE COMMITTEE, PETITIONER

v.

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission ("the Commission") became a party to the Chapter X reorganization proceedings pursuant to Section 208 of the Bankruptcy Act, 11 U. S. C. § 608, participated as an appellee before the Circuit Court of Appeals, and is a statutory respondent herein. It submits this brief in support of reversal of the portion of the judgment below presently under review.

OPINIONS BELOW

The District Court rendered no written opinion, but stated the grounds for its decision during the argument (R. 56–57). Thereafter, it entered an order and judgment embodying findings of fact and conclusions of law (R. 192). The opinion of the Circuit Court of Appeals (R. 214) is reported in 151 F. 2d 470.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 9, 1945 (R. 213). Rehearing was denied on November 26, 1945 (R. 241). The petition for writs of certiorari of the Vanston Bondholders Protective Committee (Oct. Term, 1945, Nos. 848 and 849) was filed on February 14, 1946, and the petition for certiorari of the Van Horn Bondholders Protective Committee (Oct. Term, 1945, Nos. 850 and 851), on February 15, 1946. Writs of certiorari were granted on March 25, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. § 347 (a), and Section 24 (c) of the Bankruptcy Act, as amended, 11 U. S. C. § 47 (c).

QUESTIONS PRESENTED

The principal question is whether a bankruptcy court presented with a choice of law problem in determining the validity of a claim against the debtor's estate should apply (1) the conflicts rule of the forum state under *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, and *Klaxon Co.* v. *Stentor Electric Mfg. Company*, 313 U. S. 487, (2) an independent federal rule of conflicts, or (3) considering the various conflicts rules of the states in which the debtor would be amenable to suit apart from bankruptcy, that rule most favorable to upholding the claim.

Subsidiary questions include whether the court below correctly interpreted the Kentucky choice of law rule and the substantive law of New York, in so far as either may be found to be determinative.

STATEMENT

The debtor Inland Gas Corporation ("Inland") is a Delaware corporation (R. 101; 197) having its principal assets and principal place of business in Kentucky (R. 104–105; 121; 153). It is a subsidiary of the debtor American Fuel and Power Company ("American Fuel"), a parent holding company, as is also the debtor Kentucky Fuel Gas Corporation ("Kentucky Fuel"). Together with certain other subsidiaries, they comprise the so-called American Fuel and Power System (R. 121–123). Inland and Kentucky Fuel have been under the jurisdiction of federal district courts since 1930, and the others since some years thereafter (R. 113).

On December 2, 1930, an equity receiver was appointed for Inland by the District Court for the Eastern District of Kentucky upon a general creditors' bill to which Inland consented (R. 101; 113). As the court below found in a companion case, *Columbia Gas & Electric Corp.* v. *United States, et al.*, 151 F. 2d 461 (1945), petition for certiorari filed May 29, 1946 (Nos. 129, 130, 131, this Term), the receivership was instigated by Columbia Gas and Electric Corporation

("Columbia") as part of a scheme to stifle the threatened competition of the American Fuel and Power System. Inland defaulted on the semi-annual interest coupons due February 1, 1931, on its first mortgage bonds (R. 187). On April 3, 1931, the indenture trustee declared the entire principal due and payable pursuant to the acceleration provisions of the indenture. This was followed by a bill of foreclosure filed by the indenture trustee on April 14, 1931, which extended the equity receivership and sequestered the income of Inland for the benefit of its first mortgage bondholders. On October 15, 1935, a creditors' petition for the reorganization of Inland under Section 77B of the Bankruptcy Act was filed in the same district court and was approved by an order of the court dated November 23, 1935 (R. 152; 162). The provisions of Chapter X of the Bankruptcy Act were subsequently made applicable to these proceedings (R. 191).

Reorganization has been delayed in part by controversy as to whether the claims of Columbia against Inland and the other debtors should be subordinated to the interests of public security holders,[1] and also by the present dispute as to

[1] Subordination is required under the ruling of the court below which found that Columbia's claims were acquired in violation of the federal anti-trust laws for the purpose of stifling the threatened competition of Inland as part of the American Fuel and Power System. *Columbia Gas & Electric Corp, v. United States, et al.*, 151 F. 2d 461 (1945), petition for certiorari pending (Nos. 129, 130, 131, this Term.)

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whether the claim of the first mortgage bondholders properly includes an item for interest on overdue interest. Delay in the consummation of a plan has enabled the first mortgage bondholders to claim interest on interest in substantial amounts.[2]

The claim here involved is based upon an express covenant in an indenture pursuant to which Inland publicly financed a ten year first mortgage bond issue in 1928 (R. 121–122, 204–205). The indenture was executed in New York, named a New York corporation as trustee, and both bonds and attached interest coupons were made payable in New York, or at the option of the holder, in Chicago, Illinois, where the debtor maintained a paying agent (R. 197–202). The issue was underwritten and sold to the public in the various states by a group of investment bankers (R. 121–122). The covenant in question appears in those provisions of the indenture which relate to the application of monies received by the trustee upon operation or sale of the mortgaged assets after declaration of default (Art. VII Sec. 9; R. 204–205), and, considering the scope and character of the debtor's business, is one which would normally be enforced in a federal liquidation or reor-

[2] Assuming that the ruling of the court below stands with respect to the subordination of the Columbia claims, it appears probable that the mortgaged assets have sufficient value to cover in full the first mortgage bondholders' claim for principal and interest, plus interest on interest.

ganization proceeding.[3] The covenant, moreover, appears to be a rather common one in indentures executed with New York corporate trustees, as is indicated by a survey of indentures on file with this Commission.[4]

The issue of the validity of the covenant was presented to the District Court upon an application for distribution of funds filed by the Van Horn Committee, representing first mortgage bondholders, and the response and petition for advice filed by the reorganization trustee (R. 15–19; 166; 171). The District Court assumed the matter to be governed by the law of New York, where the indenture was executed; and relying on the express holding of Judge Patterson in *American Brake Shoe & Foundry Company* v. *Interborough Rapid Transit Company*, 26 F. Supp. 954 (S. D. N. Y. 1939), that such a covenant was valid in that state, reached a similar conclusion (R. 195). On appeal to the Circuit Court of Appeals for the Sixth Circuit, respondents challenged the District Court's determination on the ground that the New York law prohibited the "compounding of interest," which they asserted would be the effect

[3] See n. 29, *infra*.

[4] Of 57 indentures selected at random from the Commission's files of indentures qualified under the Trust Indenture Act of 1939, 15 U. S. C. §§ 77aaa, *et seq.*, each pertaining to an issue of securities in an amount over $1,000,000, 49 contained covenants for interest on overdue installments of interest. Of these, 18 more recent indentures limited the effectiveness of the covenant to the extent permitted by law.

of allowing the instant claim. They recognized an exception in the local law permitting the collection of simple interest on overdue interest coupons, but contended that it was applicable to detached and negotiated coupons only.

In the absence of any governing state court holding and in light of Judge Patterson's ruling on the precise point, the Commission expressed its agreement with petitioners' view of New York law as upholding the covenant, but also contended that the law of that state was not controlling. The Commission urged that the question be determined in accordance with the general principle of federal bankruptcy law that a claim is to be recognized as valid by a Chapter X court if it is valid and enforceable apart from bankruptcy. The debtor here was amenable to suit in, at least, Delaware (where it was incorporated) and Kentucky (its principal place of business); and the Commission argued that had suit been brought in either of these states, the validity of the covenant would have been upheld.

The Circuit Court of Appeals held, however, that the validity of the covenant for interest was governed by the *lex loci contractus*, assumed to be that of New York (R. 219). Examining the "confused status" of the substantive law of New York, the court concluded that the claim should be disallowed (R. 226).

SUMMARY OF ARGUMENT

While the basis of its ruling is not entirely clear, the court below apparently determined that the jurisdictional source of the applicable choice of law rule respecting the validity of the covenant was either the law of Kentucky, as the forum state, or the federal law. In our view it was error to have referred to the forum state, as such, since the doctrine of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, and *Klaxon Co.* v. *Stentor Electric Mfg. Company*, 313 U. S. 487, is inapplicable in a proceeding arising under the federal bankruptcy jurisdiction. It was also erroneous to determine, as a matter of federal conflicts law, that the law of New York, as the place of formal execution of the indenture, governed the validity of the covenant.

Since, apart from certain equitable considerations not involved here, a claim is entitled to be recognized as valid in bankruptcy if it is valid and enforceable apart from bankruptcy, the court should have given the claimants the benefit of the most favorable conflicts rule of any of the forums in which suit could have been brought if the debtor were not in bankruptcy. In the present case, suit could have been instituted either in Delaware, the debtor's state of incorporation, or in Kentucky, its principal place of business and the location of the mortgaged assets. While the court below inquired into the applicable Kentucky law, we believe it erred in concluding that the covenant would not have been enforced

by the Kentucky state courts. It relied upon generalized pronouncements of Kentucky courts in cases involving dissimilar considerations. Furthermore, the court below failed to inquire into the Delaware law which would have been applied in a suit upon the covenant. In our view Delaware law, like that of Kentucky, would have sustained the covenant. We think that both Kentucky and Delaware would have held that, in the absence of an overriding policy of any state possessing a greater interest in the matter, the proper rule of conflicts is to give effect to the presumed intention of the parties that the covenant be valid and enforceable, and accordingly to apply the substantive law of any state having a substantial relationship to the transaction under which the covenant would be regarded as valid. In this connection it is relevant that the federal decisions in diversity cases during the *Swift* v. *Tyson* era seemed to apply a similar conflicts rule.

Since the covenant here was admittedly valid as a matter of substantive law in Kentucky, the location of the mortgaged assets and the debtor's principal place of business, in Illinois, the alternative place of performance, and in Delaware, the debtor's place of incorporation, and since the assumed contrary policy of New York could relate only to the protection of local residents against improvident contracts and not to transactions between a non-resident corporate borrower and a group of nationwide public investors, the covenant

would be valid under the substantive law of every state having a substantial relationship to the transaction. Accordingly, it should be recognized as valid for purposes of bankruptcy.

While the Commission does not regard the substantive law of New York as controlling, it believes that the court below also erred in its determination that the covenant was invalid under that law. In the Commission's view an express covenant to pay interest on overdue interest coupons is valid in New York for the reasons set forth in Judge Patterson's opinion in *American Brake Shoe & Foundry Company* v. *Interborough Rapid Transit Company*, 26 F. Supp. 954 (S. D. N. Y., 1939). Detailed argument on this point, however, has been left to the interested private parties.

ARGUMENT

The court below ruled that a federal bankruptcy court sitting in Kentucky must hold invalid an indenture covenant for interest on overdue installments of interest in a multi-state public financing because, in the opinion of the court below, such a covenant would not be enforced in New York, where the indenture was executed. In reaching its ultimate conclusion, the court had to determine, first, the jurisdiction from which to seek a choice of law rule; second, the applicable choice of law rule of that jurisdiction; and third, the substantive law of the jurisdiction to which reference was eventually to be made. The petitioners and the Commission challenge the correctness of each determination of the Circuit Court of

Appeals, and the anomalous result reached by the combination of such determinations whereby a covenant in common use, generally accepted by the financial community and admittedly valid in the jurisdictions possessing the most substantial interests in the financing involved, is invalidated because of an assumed local policy of a state having a comparatively minor interest in the matter, despite (1) the absence of any clear-cut indication of invalidity in the decisional or statutory law of that state, and (2) the express holding of a federal district court sitting in that state, and presumably as familiar with local law as any federal court is likely to be, that the covenant is valid under the law of the state.

I. THE COURT BELOW ERRED IN FAILING TO GIVE THE CLAIMANTS THE BENEFIT OF THE MOST FAVORABLE CONFLICTS RULE OF ANY JURISDICTION IN WHICH ACTION COULD HAVE BEEN BROUGHT APART FROM BANKRUPTCY.

In determining that the substantive law of the place of contracting, assumed to be New York, governed the validity of the claim involved in these proceedings, the court below relied upon two non-bankruptcy federal cases[5] and three Kentucky cases,[6] all dealing in general terms with problems

[5] *Scudder* v. *Union National Bank*, 91 U. S. 406, and *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397. We note later our disagreement with the interpretation of these precedents by the court below. See pp. 20–21, *infra*.

[6] *Moody* v. *Barker*, 188 Ky. 401, 222 S. W. 89 (1920); *Fry Bros.* v. *Theobold*, 205 Ky. 146, 265 S. W. 498 (1924); and *Cooper's Adm'r* v. *Lebus' Adm'rs*, 262 Ky. 245, 90 S. W. 2d 33 (1936).

of the conflict of laws as applied to contracts (R. 219, 221). While the court below did not explicitly commit itself to a choice between federal and Kentucky law as the jurisdictional source of the choice of law rule—its theory apparently being that the same result would obtain under either law—it referred to the Kentucky decisions only because the bankruptcy court was located in that state and the conflicts rule of the forum state might be binding upon a bankruptcy court under the doctrine of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, as applied to conflicts questions by *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487. Petitioners have construed the ruling below as requiring a bankruptcy court to follow the conflicts rule of the forum state in all matters (Petition, Oct. Term, 1945, Nos. 848, 849, p. 7; Petition, Oct. Term, 1945, Nos. 850, 851, p. 3). On the other hand, some of the respondents have taken the view that the court below applied what is, in essence, an independent federal choice of law rule (Early Brief in Opposition to Petition, p. 9). We believe that on either interpretation the determination below was erroneous.

If petitioners are correct in interpreting the ruling below to mean that a bankruptcy court, in

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determining the validity of a claim against a debtor's estate arising out of a multi-state transaction, is bound to follow the choice of law rule of the forum state under the *Erie* and *Klaxon* decisions, we believe that such a ruling would be an extension of the doctrine of these cases to an area in which it has no relevant application. The decisions of this Court during the past two terms have made it clear that the *Erie* doctrine is applicable only to an action brought in a federal court merely because it is "between Citizens of different States" under Article III, Section 2 of the Constitution. *Guaranty Trust Company* v. *York*, 326 U. S. 99; *Williams* v. *Green Bay & Western R. R. Co.*, 326 U. S. 549; *Holmberg* v. *Armbrecht*, 327 U. S. 392; *Heiser* v. *Woodruff*, No. 496, Oct. Term, 1945, decided April 22, 1946. As the Court stated in the *Holmberg case* (327 U. S. at 394), "For purposes of diversity suits a federal court is, in effect, 'only another court of the State'." The opinion in the *Erie* case observed that "diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State." 304 U. S. 64, 74. Accordingly, Section 34 of the Federal Judiciary Act of 1789, 28 U. S. C. § 725, was not to be construed so as to create an independent body of federal "general law" applicable to rights having their origin in state law, merely because a non-

resident plaintiff availed himself of the privilege of suing in a federal court.

The bankruptcy jurisdiction of a federal court, however, is quite different. As we endeavor to show below, the nature and purpose of the federal bankruptcy jurisdiction are such as to render inapplicable the considerations underlying the *Erie* doctrine. The rationale of that doctrine is that in a diversity proceeding there should be no difference in result whether the non-resident plaintiff institutes his action in a state court or elects to bring suit in a federal court sitting in that state. Claimants against a bankrupt estate, however, have no choice between state or federal forums but are compelled to present their claims in a single bankruptcy court. Had there been no bankruptcy, these claims might well have been enforced in states other than that in which the bankruptcy court sits. Whatever the relevance in bankruptcy of considerations pointing to the desirability of uniform results as between federal and state tribunals, those considerations cannot require the bankruptcy court to conform to the law of the state in which it sits, if, apart from bankruptcy, suit might well have been brought in a court of some other state which would apply a different rule of law.

Moreover, in looking to the conflicts rule of the

forum state, the court below was attaching a significance to the forum which is hardly warranted by the place it holds in the federal bankruptcy scheme. Venue in bankruptcy proceedings is determined principally by the convenience of the parties, and not by any considerations relating to the substantive character of the claims involved. Ordinarily, the Chapter X forum is where the debtor's principal place of business or principal assets are located. Sec. 128, 11 U. S. C. § 528. But where the debtor is a subsidiary corporation, a petition may also be filed in the court which has approved a petition by or against the parent. Sec. 129, 11 U. S. C. § 529. And, in any event, regardless of the location of the principal assets of the debtor or its principal place of business, the judge may transfer a Chapter X proceeding to a court of bankruptcy in any other district, if the interests of the parties will be best served by such transfer. Sec. 118, 11 U. S. C. § 518.

Clearly, therefore, the court below erred in so far as it may have held that a federal bankruptcy court, in determining the validity of claims asserted, is bound to follow the conflicts rule of the state in which it sits. It does not follow, however, that a bankruptcy court should adopt an independent federal choice of law rule, such as, for example, to refer directly to the substantive law of the place of contracting or of the place of performance or

of some other state having a substantial relationship to the transaction. Congress might have done so by express legislation, as indeed it might have expressly enacted provisions of substantive law governing the recognition of claims for interest against a bankrupt estate.[7]

But Congress has not seen fit to legislate with respect to these matters. From the general pattern of the statute, however, the federal courts have derived the general principle that a claim is valid in bankruptcy if it is valid and enforceable apart from bankruptcy,[8] provided, of course, that there are no equitable considerations calling for different treatment because of the fed-

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[7] As to the potential scope of permissible legislation under the federal bankruptcy power, see *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, Rock Island & Pac. Ry.*, 294 U. S. 648. Congress has already touched upon the subject of the status of claims for interest in excluding from provable claims filed by unsecured creditors against an insolvent estate items of interest accruing after the date of a petition in bankruptcy. Section 63a (1), 11 U. S. C. § 103a (1). That section, however, is only procedural in character since it does not preclude the payment of interest on a claim should it later develop that there are sufficient assets remaining after the satisfaction of the principal indebtedness; and, to the extent that a creditor has security sufficient to pay interest on his claim after satisfaction of the principal debt, the section is also inapplicable. See 3 *Collier on Bankruptcy* (14th ed., 1941) § 63.16, and cases cited.

[8] See *Bryant, Trustee* v. *Swofford Bros. Dry Goods Co.*, 214 U. S. 279; *In re Talbot Canning Corp.*, 35 F. Supp. 680 (D. Md., 1940); 3 Collier, *Bankruptcy* (1941) pp. 1768, 1795, 1796; 2 Remington, *Bankruptcy* (1940) § 955.

eral policy of distribution in bankruptcy.[9] However, the principle upon which the substantive law of a particular state is applied in the determination of a validity of a claim is derived not from considerations underlying the doctrine of the *Erie* case, but from the federal statute itself which is construed to require reference to state law in such matters. In *American Surety Co. v. Sampsell*, 327 U. S. 269, 272, this Court said: "True, we stated in both *Prudence* opinions that the federal law governing distribution of a bankrupt's estate should be applied with 'appropriate regard for rights acquired under rules of state law . . .' But the extent to

[9] As this Court recently observed in *Heiser* v. *Woodruff, et al.*, No. 496, Oct. Term, 1945, decided April 22, 1946, a bankruptcy court is not required "to adopt local rules of law in determining what claims are provable, or to be allowed, or how the bankrupt's estate is to be distributed among claimants." In determining what claims are provable and "what objections may be made to their proof, and in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy, requires its rejection or its subordination to other claims which, in other respect are of the same class, the bankruptcy court is defining and applying federal, not state, law." Compare *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89, 95–96; *United States* v. *Pelzer*, 312 U. S. 399, 402–3; *Prudence Realization Corp.* v. *Ferris*, 323 U. S. 650; *American Surety Co.* v. *Sampsell*, 327 U. S. 269; *Brown* v. *Gerdes*, 321 U. S. 178; *McKenzie, Trustee* v. *Irving Trust Company*, 323 U. S. 365; *In re 1934 Realty Corp.*, 150 F. 2d 477 (C. C. A. 2, 1945), certiorari denied *sub. nom. Prudence Realization Corp.* v. *Hurd Committee*, 326 U. S. 734; *In re Associated Gas and Electric Co.* (S. D. N. Y., July 17, 1946) C. C. H. Bkcy. L. Rep. par. 55,704.

which state law is to be considered is in the last analysis a matter of federal law." [10]

As illustrated by the present case, reference to state law for the determination of the validity of a claim in bankruptcy arising from a multi-state transaction often gives rise to choice of law problems. While the Bankruptcy Act makes no provision for the choice of law rules which should govern in proceedings under that statute, there is a substantial body of federal decisions on conflict of laws problems.[11] These cases, for the most part, arose in the *Swift* v. *Tyson* [12] era, so that the decisions therein to apply independent federal rules of conflicts in diversity proceedings are now overruled. However, the principles enunciated in these cases are still relevant in dealing with questions where a federal court is not bound by

[10] The validity, as a matter of public policy, of a covenant for interest on interest, as applied to interest accruing since the date of a federal equity receivership or bankruptcy proceeding, might conceivably be regarded as a proper subject for independent decision by the federal court, even in the absence of direct legislation. The consequence of such a holding would be to afford greater uniformity and certainty in dealing with a problem which appears to be arising with increasing frequency in reorganization proceedings and occasionally in the state courts. See cases cited *infra* n. 29. We recognize, however, that there is no precedent for such a rule. The closest analogy would appear to be those cases holding that the equitable status of certain claims is a matter of bankruptcy law. See n. 9, *supra*.

[11] See p. 21, *infra*.

[12] 16 Pet. 1.

state choice of law rules. Accordingly, if there were no overriding policy of the Bankruptcy Act to recognize claims in bankruptcy as valid if they were valid and enforceable apart from proceedings under the statute, we believe that the bankruptcy court should apply a federal choice of law rule. Even in such event, however, we do not agree with the court below that application of the federal choice of law precedents governing the validity of a covenant for interest on interest would have invalidated the instant claims under the substantive law of the place of contracting, assumed to be New York. We do not regard the federal cases [12] cited by the court below as authority for such a conclusion. On the contrary, the rule set forth in the many federal decisions dealing specifically with interest questions would uphold the covenant if, without regard to the substantive law of the place of contracting, the covenant is valid in a state where the bondholders had an option to receive payment, or where the mortgaged assets are located, or perhaps where the debtor is incorporated or has its principal place of business.

Federal courts have referred to the law of the place of contracting where that state bore a more substantial, if not dominant, relationship to the transaction involved and no other state possessed a contrary overriding policy, the theory being that

[12] See n. 5, *supra*.

the parties intended the law of that state to apply. Such were the cases relied upon by the court below: *Scudder* v. *Union National Bank,* 91 U. S. 406, and *Liverpool Steam Co.* v. *Phenix Insurance Co.,* 129 U. S. 397. As respects agreements for interest, however, the federal policy, so far as it can be derived from usury cases, has, like that of most states, departed from the ancient prejudice against interest claims and has tended to uphold the agreement of the parties in such matters. These cases, generally speaking, have referred to any state bearing a substantial relationship to the transaction under the law of which the contract is valid, provided that there is no clearly contrary overriding policy of another state possessing a more substantial interest in the matter. *Seeman* v. *Philadelphia Warehouse Co.,* 274 U. S. 403; *Cromwell* v. *County of Sac,* 96 U. S. 51; *Smith* v. *Western & Southern Life Ins. Co.,* 87 F. 2d 839 (C. C. A. 5, 1937); *Joffe* v. *Bonp,* 14 F. 2d 50 (C. C. A. 3, 1926); *Brierley* v. *Commercial Credit Co.,* 43 F. 2d 724 (E. D. Pa., 1929), affirmed, 43 F. 2d 730 (C. C. A. 3, 1930), certiorari denied, 282 U. S. 897; *Braniff Investment Co.* v. *Norton,* 80 F. 2d 598 (C. C. A. 5, 1935), certiorari denied, 298 U. S. 663; *Merchants' & Manufacturers' Securities Co.* v. *Johnson,* 69 F. 2d 940 (C. C. A. 8, 1934), certiorari denied, 293 U. S. 569; *In re Champion Shoe Machinery Co.,* 17 F. Supp. 985 (E. D. Mo., 1937); see also state cases

collected in Notes, L. R. A. 1916D 750 and 125 A. L. R. 482.[14]

However, as has been indicated, if application of an independent federal rule of conflicts in the determination of the validity of a claim in bankruptcy in a particular case would run counter to the underlying purpose of the statute to accord the claim the validity it possesses apart from bankruptcy, we believe that such application could not properly be made. A claim, such as the one here involved, which is not predicated upon federal law must necessarily find its origin in state law. Accordingly, unless some state having a relevant connection with the claim would recognize it as valid under its own law, it would be axiomatic that the bankruptcy court could not entertain it. Where state rules with respect to choice of law enter into the determination of the validity of a claim apart from bankruptcy, as they do to the extent that validity may be thought to depend on enforceability in an available forum, the bankruptcy court should look to the results which would have prevailed in such forums as would have been available apart from bankruptcy. In a sense this is a special rule as to choice of law applicable in bankruptcy and based upon impli-

[14] See also 2 Beale, *Conflict of Laws* (1935), p. 1241; Goodrich, *Conflict of Laws* (1927), p. 238; 6 Williston, *Contracts* (Rev. ed., 1938) § 1792, p. 5097; Cavers, *A Critique of the Choice-of-Law Problem* (1933), 47 Harv. L. Rev. 173, at 182.

cations drawn from the bankruptcy law itself that claims provable in bankruptcy should correspond to claims enforceable outside of bankruptcy. To hold otherwise where the local law is clear would involve the anomalous result that a claim which could not have been the basis for successful action outside of bankruptcy is nevertheless provable in bankruptcy, or *vice versa*.[18]

In accordance with this approach, the Commission urges here, as it did in the court below, that the bankruptcy court should have given the first mortgage bondholders the benefit of either the conflicts rule of Kentucky (where Inland has its principal place of business), or that of Delaware (where Inland was incorporated), whichever might appear more favorable in view of the fact that, apart from bankruptcy, suit could have been brought in either state. And if a federal conflicts rule should be deemed applicable, we believe that the same result would be reached, because in our view a bankruptcy

[18] The question of choice of law in determining the validity of a claim might not affect the character of the claim as a liquidated one; yet, one could hardly visualize permitting an involuntary bankruptcy proceeding to be instituted through the use of claims which could not be the basis of recovery outside of bankruptcy. Conversely, where voluntary bankruptcy proceedings are instituted because of a debtor's inability to meet claims enforceable outside of bankruptcy, it would hardly fulfill the purpose of the proceedings to disallow these claims in bankruptcy. Likewise, problems of financial accounting would be vastly complicated if potential liabilities would have to be set up so as to reflect differences of enforceability, depending upon the contingency of whether or not bankruptcy proceedings should develop.

court, correctly following the applicable federal precedents, would have applied a choice of law rule under which the covenant would be upheld.

II. THE COURT BELOW ERRED ALSO IN ITS DETERMINATION OF THE APPLICABLE CHOICE OF LAW RULES OF THE JURISDICTIONS WHICH IT REGARDED AS CONTROLLING

In reaching its determination that both federal and Kentucky law required reference to the substantive law of New York, the court below cited no directly applicable precedents but appears to have relied upon generalized pronouncements of the federal and Kentucky courts in unrelated situations. As a result, it invalidated the agreement of the parties upon the basis of an assumed public policy of a state having, we submit, little if any relevance to the particular transaction.

The artificiality of applying a rule which invalidates the present covenant under an assumed rule of New York law, as the "place of contracting", is emphasized where, as here, the real parties in interest, both now and in contemplation at the time, were the Delaware incorporated debtor and a nation-wide group of investors who presumably purchased their bonds in the several states where they resided. Had a Delaware or Kentucky indenture trustee been selected, the contract between the debtor and indenture trustee would probably have been executed in Delaware or Kentucky and the instant problem would not have

arisen. The mere fact that the indenture was executed in New York with a New York trustee should not give overriding significance to a rule of New York substantive law derived from a public policy which could relate only to protecting local debtors from improvident contracts, not to preventing New York trust companies from functioning as indenture trustees under forms of indentures not contrary to the policy of the issuer's place of incorporation or principal place of business.[18]

We have already expressed our disagreement with the conclusion of the court below as to the federal rule of conflicts to be derived from the *Scudder* and *Liverpool* cases. See pages 19–21, *supra*. As to Kentucky law, the Court of Appeals of that State, while following the law of the place of contracting in other types of cases, appears to have adopted the "presumed intent" rule in usury cases involving the validity of interest provisions. See *William Glenny Glass Co.* v. *Taylor*, 99 Ky. 24, 34 S. W. 711 (1896); *Wedding* v. *First National Bank*, 280 Ky. 610, 133 S. W. 2d 931 (1939); *Commonwealth Farm Loan Co.* v. *Caudle*, 203 Ky. 761, 263 S. W. 24 (1924); *Pensacola & A. R. R. Co.* v. *Hilton's Trustee*, 147 Ky. 553, 144 S. W. 1077 (1912). The court below recognized that the covenant for interest on interest was valid under

[18] Compare Professor Walter Wheeler Cook's analysis of a similar fact situation in *"Contracts" and the Conflict of Laws: "Intention of the Parties* (1938), 32 Ill. L. Rev. 899, 908 *et seq.*

the local substantive law of Kentucky,[17] the location of the mortgaged assets and of Inland's principal place of business, and of Illinois,[18] the alternate place for payment of the bonds and coupons (151 F. 2d at 475; R. 220). It appears also that the covenant is valid in Delaware, where Inland was incorporated.[19] Thus, in addition to Illinois, the alternate place of performance, the covenant is valid as a matter of substantive law in Delaware and Kentucky, and the relationship of these three states to the financing operation here involved is far more substantial, as a practical matter, than that of New York.[20] Moreover, there is no federal public policy against enforcement in a federal court of the covenant to pay simple interest on overdue interest coupons.[21]

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[17] See *McWilliams* v. *Northwestern Mutual Life Insurance Company*, 285 Ky. 192, 147 S. W. 2d 79 (1940), and cases cited therein.

[18] See *Bowman* v. *Neeley*, 137 Ill. 443, 27 N. E. 758 (1891); *Bowman* v. *Neely*, 151 Ill. 37, 37 N. E. 840 (1894); *Harper* v. *Ely*, 70 Ill. 581 (1873); *Benneson* v. *Savage*, 130 Ill. 352, 22 N. E. 838 (1889); *Drury* v. *Wolfe*, 134 Ill. 294, 25 N. E. 626 (1890); *Abbott* v. *Stone*, 172 Ill. 634, 50 N. E. 328 (1898).

[19] *Central National Bank* v. *Bateman & Companies, Inc.*, 15 Del. Ch. 31, 131 Atl. 202 (1925).

[20] Perhaps relevant to the public policy of the states involved are statutes in Delaware, Illinois and New York which render the defense of usury unavailable to corporate debtors: see Del. Rev. Code (1935), § 3101; Ill. Rev. Stat. (1935), c. 74, par. 5; 19 McKinney's Cons. Laws of N. Y. (Gen. Bus. Law), § 374.

[21] See *Town of Genoa* v. *Woodruff*, 92 U. S. 502; *Amy* v. *Dubuque*, 98 U. S. 470, 473; *Edwards* v. *Bates County*, 163 U. S. 269, 272.

The court below, however, relied upon generalized statements of the Kentucky court in dissimilar cases,[22] to the effect that the validity of a contract is to be determined by the law of the place of contracting, which it assumed to be that of New York, where the indenture was executed. Its ruling is reminiscent of a judicial approach recently criticized by Mr. Justice Jackson—i. e., one which assumes "that the process of judging state law by a federal court can be so mechanical that, without the use of judgment of its own, it can pick out and apply state precedents which determine the law of the state."[23] As Mr. Justice Jackson stated, "the process of finding decisional law [cannot] be so simplified."[24]

We respectfully submit that the court below, in conscientiously attempting to follow such guide

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[22] *Moody* v. *Barker*, 188 Ky. 401, 222 S. W. 89 (1920) (wife's liability as surety on husband's note); *Fry Bros.* v. *Theobold*, 205 Ky. 146, 265 S. W. 498 (1924) (effect of seller's failure to record conditional sale as against creditor or innocent purchaser from buyer); *Cooper's Adm'r* v. *Lebus' Adm'rs*, 262 Ky. 245, 90 S. W. 2d 33 (1936) ("insurable interest" in life of business partner). In none of these cases did it appear that a state other than the place of contracting possessed any peculiar relationship to the transaction involved.

[23] Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution* (1945) 45 Col. L. Rev. 1, n. 1, containing the text of an address at the Fourth Annual Benjamin N. Cardozo lecture delivered December 7, 1944, under the auspices of the Committee on Post-Admission Legal Education of the New York City Bar Association.

[24] *Ibid.* See also Cardozo, *The Nature of the Judicial Process* (1921), pp. 64, *et seq.*

posts to Kentucky law as were furnished by the decisions of its state courts, took too literally the broad generalizations appearing in such decisions. It may not have sufficiently appreciated that "principles" announced in conflicts cases are often deceptive because of their easy generality, and that choice of law problems bring forth different criteria and varying solutions depending upon particular circumstances. Perhaps in no other field of law is there as much ambiguity of terminology and divergence of criteria. A commentator on the Kentucky law of conflicts relating to contracts has pointed out that, at one time or another, the Kentucky court itself has expressed all of the divergent views—i. e., the law of the place of contracting, the law of the place of performance, and the intention of the parties—and that no single dominant rule can be derived from the Kentucky decisions.[25] Such a situation, probably similar to that in many other states, illustrates the difficulties under which a federal court in such a situation labors; and emphasizes the importance of examining conflicts decisions for their actual holdings and underlying rationale. Were the present case before the highest court of Kentucky, that court would resolve the instant controversy in light of its best judgment as to what would be a proper rule of conflicts in the premises, with due regard to any existing precedents in similar cases. A federal court interpreting state law is charged with the same duty. See *Wichita Royalty*

[25] See Allen, *What Law Governs the Validity of a Contract in Kentucky*, (1939) 28 Ky. L. J. 70.

Company v. *City National Bank of Wichita Falls*, 306 U. S. 103; *West* v. *American T. & T. Company*, 311 U. S. 223, 237; *Meredith* v. *Winter Haven*, 320 U. S. 228, 234, 237–8. In view of the comparatively minor interest of New York in the transactions involved, the importance to public investors and to the financial community of upholding the obligations of corporate securities so widely sold, the absence of any clear indication of invalidity under the New York law, and the general validity of the covenant elsewhere, we believe that the Kentucky state courts would have reached a conclusion different from that of the court below.

As previously noted, the court below made no inquiry into the Delaware law of conflicts. We are aware of no Delaware case in point, but in the absence of a controlling local precedent to the contrary, it would be reasonable for a federal court to conclude that the Delaware court would adhere to the rule generally prevailing elsewhere with respect to contracts for interest.[26] The result would be to uphold the contract.[27]

[26] *Cf. Zephyr American Corp.* v. *Bates Mfg. Co.*, 128 F. 2d 380, 387 (C. C. A. 3, 1942); *Hornstein* v. *Kramer Bros. Freight Lines*, 133 F. 2d 143 (C. C. A. 3, 1943).

[27] In the event that this Court should hold either (1) that a proper interpretation of the choice of law rule of Kentucky would uphold the contract as valid under the substantive laws of Kentucky, Delaware or Illinois, or (2) that the court below erred in assuming such an agreement to be contrary to the public policy of New York, it would not be necessary to consider the Delaware choice of law rule. If, however, decision of the case should necessitate inquiry into the Delaware choice of law rule, we believe that, in the interest

On the assumption that an independent federal rule of conflicts may not be applied for the purpose of determining the validity of claims against the estate, it would seem that the field of the conflict of laws—being inherently interstate in character and involving often problems of comity among states and issues of constitutional significance—is one in which the federal courts might properly exercise a certain degree of initiative for the purpose of developing in the various local jurisdictions uniform standards suitable to the needs of a united nation. Where the local law, because of its silence on the particular problem or otherwise, provides no guiding standards, it has been suggested that a federal court should refrain from purely mechanical adjudication and should assume that the local courts will ultimately follow that choice of law rule which commends itself to the federal court as most consonant with interstate comity.[28]

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of terminating the litigation, this Court itself should decide that question rather than remand for determination by the lower court. Including the period of the equity receivership, the debtor has been in reorganization nearly 16 years.

[28] Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie* v. *Tompkins*, (1946) 55 Yale L. J. 267, at 295–296; cf. *Stekler* v. *Pennroad Corp.*, 136 F. 2d 197, 199 (C. C. A. 3, 1943).

Compare the presumption which exists in many states that the conflicts rule of a particular state is the same as that of the forum, unless the contrary is shown. See, e. g., *In re Wisconsin Central Ry. Co.*, 64 F. Supp. 251, 256 (D. Minn., 1946); *Petersen* v. *Chicago, Great Western Railway Co.*, 138 F. 2d 304 (C. C. A. 8, 1943); *Waggaman* v. *General Finance Co.*, 116 F. 2d 254 (C. C. A. 3, 1940). See also 3 Beale, *Conflict of Laws* (1935), p. 1683.

III. WHILE THE LAW OF NEW YORK IS NOT CONTROLLING, THE COMMISSION DISAGREES WITH THE CONCLUSION OF THE COURT BELOW AS TO THE SUBSTANTIVE LAW OF THAT STATE

It does not appear that the New York Court of Appeals has yet ruled upon the validity of an express covenant to pay simple interest on overdue coupons attached to a corporate bond, and certainly not in the setting of a multi-state financing. This may be due to the fact that the problem is not likely to arise in the state courts, for following default a corporation generally finds itself in liquidation or reorganization under the Bankruptcy Act.[29] The precise question, however, was presented to a federal court in New York in *American Brake Shoe & Foundry Company* v. *Interborough Rapid Transit Company*, 26 F. Supp. 954 (1939) where then District Judge Patterson, sitting in the Southern District of New York, reviewed the New York decisions and found

[29] For example, the question was involved in the recent reorganization cases of *In re Chicago, Rock Island and Pac. Ry. Co.* (*Traphagen* v. *Fleming*), 155 F. 2d 889 (C. C. A. 7, 1946), petition for certiorari pending, No. 454, this Term, *In re Realty Associates Securities Corp.*, 66 F. Supp. 416 (E. D. N. Y., 1946), *Guaranty Trust Company* v. *Seaboard Airline Railway*, unreported (E. D. Va., 1943), and *Chase National Bank* v. *Wabash Railway, etc.*, unreported (E. D. Va., 1941), all upholding claims for interest on interest, the latter three cases being decided under the substantive law of New York, and *Mississippi Valley Trust Company* v. *Oklahoma Ry. Co.*, 156 F. 2d 283 (C. C. A. 10, 1946) and *In re Wisconsin Central Ry. Co.*, 63 F. Supp. 151 (D. Minn. 1945) (appeal pending), disallowing claims for interest on interest, the latter also under the law of New York.

nothing therein which would invalidate an express covenant for simple interest on overdue installments of interest. Accordingly, he concluded that the covenant was valid and enforceable. While the Commission regards the opinion of Judge Patterson as reflecting an accurate and informed view of the New York law,[30] we have left detailed argument on this point to the interested private parties.

CONCLUSION

The judgment of the court below to disallow petitioners' claims for interest on the overdue interest coupons in accordance with the indenture covenant should be reversed.

Respectfully submitted.

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PHILIP ELMAN,
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ROGER S. FOSTER,
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OCTOBER 1946.

[30] His conclusion was recently adhered to by District Judge Moscowitz, sitting in the Eastern District of New York, in *In re Realty Associates Securities Corp.*, 66 F. Supp. 416 (1946), which, although not involving interest coupons, did allow simple interest on overdue interest, contrary to the assumption of the court below as to the law of that state.

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1945.

No. ~~850-851~~ 44-45

IN THE MATTER
of
VANHORN BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

against

LOUIS A. GREEN and ROBERT HEILBRUNN, known in these Proceedings as the Green Committee and Morris Green, *et al.*,
Respondents.

PETITION FOR ~~A~~ WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND SUPPORTING BRIEF.

ROBERT J. BULKLEY,
Counsel for Petitioner.

RICHARD B. HAND
Attorney for Petitioner.

Parkside Press, Inc., 32 Thames St., New York 6, N.Y., U. S. A.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, the Vanhorn Protective Committee, for First Mortgage Bondholders of Inland, respectfully shows:

Summary Statement of the Matter Involved.

The Circuit Court of Appeals for the Sixth Circuit ruled that overdue coupons on the First Mortgage Bonds of Inland Gas Corporation, a Debtor in proceedings under Chapter X of the Bankruptcy Act, do not bear simple interest, as provided in the Mortgage or Deed of Trust securing the Bonds, from the respective due dates of such coupons. Review of that decision is sought by another Committee, known as the Vanston Committee which has filed a petition for Writ of Certiorari with this Court (October Term, 1945, No. 848 -9) at or about the same time as this is filed. In its petition, said Vanston Committee has set forth a summary statement of the matter involved. In order that repetition may be avoided, Petitioner herein respectfully adopts that statement.

Opinions Below.

The opinion of the Circuit Court of Appeals is reported 151 Fed. (2d) at p. 470. Application was made by the Vanston Committee to the Circuit Court of Appeals for reargument which application was supported by petitioner herein. That application was denied November 26, 1945.

With its petition the Vanston Committee has presented to this Court, as an exhibit thereto, a duly certified transcript of the printed record in the case as the same appears in the United States Circuit Court of Appeals for the Sixth Circuit. Petitioner herein adopts that transcript.

Jurisdictional Statement.

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517,

Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C. Title 28, Sec. 347).

Questions Presented.

1. Whether in determining the rule for the choice of the governing law covering the validity of an interest provision in a multi-State contract made by a Debtor in Chapter X Bankruptcy Proceedings the Circuit Court of Appeals should select the rule of the forum State.

2. Whether such provision is invalid, although it does not violate the public policy of any of the States involved, nor of the United States, and would have been upheld if it had been litigated in the Courts of any of such States.

Reasons Relied on for Granting the Writs

Petitioner herein adopts the reasons relied on for granting the writs as same are set forth in the above mentioned petition to this Court filed by the Vanston Committee.

Specifications of Errors to be Urged.

Petitioner herein adopts the Specifications of Errors as set forth in the Vanston Petition.

Prayer for Writs

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Sixth Circuit commanding said last named Court to certify

and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y., February 15, 1946.

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Supreme Court of the United States

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Petitioner,

against

LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the Green Committee and Morris Green, *et al.*,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Petitioner herein adopts all of the argument of the Vanston Committee as fully as if same were herein repeated.

ROBERT J. BULKLEY,
Of Counsel.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1946.

Office - Supreme Court, U. S.
FILED
SEP 28 1946
CHARLES ELMORE CROPLEY
CLERK

No. 44.
No. 45.

IN THE MATTER OF
AMERICAN FUEL & POWER COMPANY, INLAND GAS CORPORATION, KENTUCKY FUEL GAS CORPORATION,
Debtors.

VAN HORN BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,
against
LOUIS A. GREEN AND ROBERT HEILBRUNN,
Known in these Proceedings as the
GREEN COMMITTEE AND MORRIS GREEN,
Respondents.

VAN HORN BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,
against
CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON AND P. G. MEADOR,
Respondents.

BRIEF FOR PETITIONER.

ROBERT J. BULKLEY,
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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 3647

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In the Supreme Court of the United States

OCTOBER TERM, 1946.

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IN THE MATTER OF

AMERICAN FUEL & POWER COMPANY, INLAND GAS CORPORATION, KENTUCKY FUEL GAS CORPORATION,

Debtors.

VAN HORN BONDHOLDERS PROTECTIVE COMMITTEE,

Petitioner,

against

LOUIS A. GREEN AND ROBERT HEILBRUNN, Known in these Proceedings as the GREEN COMMITTEE AND MORRIS GREEN,

Respondents.

VAN HORN BONDHOLDERS PROTECTIVE COMMITTEE,

Petitioner,

against

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON AND P. G. MEADOR,

Respondents.

BRIEF FOR PETITIONER.

OPINIONS OF COURTS BELOW.

The District Court rendered no opinion but during argument stated the grounds for its decision (R. 56), and thereafter made an order and judgment embodying findings of fact and conclusions of law (R. 192).

The opinion of the Circuit Court of Appeals, Sixth Circuit, is reported 151 F. (2d) 470 (1945), and is also reprinted at R. 214 *et seq.*

JURISDICTION.

The judgments of the Circuit Court of Appeals which Petitioner seeks to have reviewed were filed on October 9, 1945 (R. 213, 214). A timely petition for re-hearing was made to the Circuit Court of Appeals (R. 234, 235) and was denied November 26, 1945 (R. 241). The petition for writs of certiorari made on behalf of Van Horn Bondholders Protective Committee was filed herein on February 15, 1946. The order of this Court granting the writs of certiorari was filed March 25, 1946 (R. 242).

Jurisdiction to review this case upon writs of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; 28 U. S. C., Sec. 347), and by Bankruptcy Act, Sec. 24(c), as amended (Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 854; 11 U. S. C., Sec. 47).

STATEMENT OF CASE.

The Circuit Court of Appeals, in a proceeding under Chapter X of the Bankruptcy Act, invalidated an express agreement that overdue bond coupons should bear simple interest from their respective due dates, which agreement had been sustained by the District Court.

The "Statement of Case" as presented in the brief filed by the Vanston Committee in the companion cases, Nos. 42 and 43, is adequate and need not be here repeated. We adopt it as our own statement.

QUESTIONS PRESENTED.

1. Whether in determining the rule for the choice of the governing local law concerning the validity of an interest provision in a multi-State contract made by a Debtor in Chapter X Proceedings the bankruptcy court should select the choice of law rule of the forum State.

2. Whether a corporate undertaking to pay simple interest on overdue bond coupons is invalid, although it does not violate the public policy of any of the States involved, nor of the United States, and would have been upheld if it had been litigated in the Courts of any of such States.

SUMMARY OF ARGUMENT.

1. Question No. 1 is argued by the Vanston Committee in the companion cases, Nos. 42 and 43, and that argument is adopted by petitioners herein.
2. The Indenture provision for the payment of interest on overdue coupons which was struck down by the Circuit Court of Appeals does not violate the public policy of the United States nor of any of the States involved.

ARGUMENT.

Petitioners herein are in agreement with the argument made on behalf of the Vanston Committee in the companion cases, Nos. 42 and 43. This brief is confined to a further discussion of the public policy of the State of New York with reference to the problem herein presented.

The covenant to pay interest on overdue interest coupons is not contrary to the public policy of New York.

The public policy of the State of New York with respect to agreements providing for the payment of interest on debt has been clearly indicated by the action of the New York Legislature, in the enactment of the usury laws. The laws of New York expressly declare that any agreement to pay interest at a rate in excess of 6% per annum is usurious and void. (N. Y. General Business Law Secs. 370, 371, 372, 373.) Although it has long been held that any such agreement, whether voluntarily made or somehow exacted, violates this Statute and will not be enforced, yet corporations

are *expressly excluded* from the protection of this law (N. Y. General Business Law Sec. 374) and the Courts of New York have enforced corporate agreements to pay interest in excess of 6%. (*Union Estates Company v. Adlon Construction Co.*, 221 N. Y. 183, where an interest rate of 23% was sustained.)

Where the Circuit Court fell into error was through interpreting New York decisions which protected an individual from oppressive interest as reflecting the public policy of New York on *all* interest questions, even those involving a *corporate* borrower. No citation of authority from the New York Court of Appeals—or from the New York Appellate Division—is given to support this view, and we do not believe that any can be found.

The case of *Young v. Hill*, 67 N. Y. 162, is cited as the leading case in New York on the question of validity of agreements to pay interest on interest. That case was one between individuals, and the reasons of public policy which justified the court in ruling that compound interest would not be enforced are clearly stated in the opinion, which also made clear that, notwithstanding the rule, there still may be enforcible obligations to pay interest on interest arising even from implied agreements, when such agreements are essentially fair.

The learned judges who participated in the case of *Young v. Hill* in 1876 would be surprised to learn that, seventy years later, the salutary rule of that case would be invoked to justify the repudiation by a *corporation* of an undertaking voluntarily made by it in favor of hundreds of innocent investors, and their surprise would be still greater if they could know that the undertaking in question was not an agreement to pay compound interest, which produced the fantastically oppressive charge which they refused to enforce, but merely "an agreement to pay simple interest upon the several installments of interest as they became due" which the court, even in the case of the indi-

vidual debtor in 1876, pointed out "might not be unreasonable or inequitable."

The rule of *Young v. Hill* was plainly intended to protect the "weak and ignorant" against extortion, not the corporation against its own voluntary promise. It is certainly not a precedent for the ruling of the Circuit Court in this case.

We have been unable to find any reported case in the New York Courts which decides the question here at issue. In the absence of precedents in the New York Courts, the Federal Courts are not without power to determine the public policy of that State. In undertaking such determination in the case at bar the Circuit Court considered, but refused to follow, the decision of Judge Patterson in *American Brake Shoe & Foundry Co. v. Interborough R. T. Co.*, 26 Fed. Supp. 954, and the dictum of Judge Clancy in *Transbel Investment Co. v. Roth*, 36 Fed. Supp. 396.

However, the question of the public policy involved in the allowance of simple interest on past due interest accrued on corporation bonds has again been presented to a Federal Court in New York since the Circuit Court's decision in the instant case. In a bankruptcy proceeding, *In Re Realty Associates Securities Corporation*, 66 Fed. Supp. 416, the United States District Court for the Eastern District of New York, on June 11, 1946, allowed to bondholders simple interest at 6% on accrued interest which remained unpaid at the maturity of the bonds, even though the debtor corporation had made no promise to pay it. At page 421, Judge Moskowitz said:

> "The distinction was inferred to in *American Brake Shoe & Foundry Co. v. Interborough R. T. Co.*, D. C. S. D. N. Y., 1939, 26 F. Supp. 954, where the court stated at page 955 of 26 F. Supp.: 'Compounding interest in the adding of accumulated interest to the principal at periodic intervals. An agreement to pay simple interest on an overdue installment of interest is different. Computations show it to be far less onerous

on the debtor.' The same distinction is recognized in the case which has been most often cited as authority against the validity of compound interest, *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99, where at page 174 of 67 N. Y., the court stated: 'An agreement to pay simple interest upon the several instalments of interest as they became due * * * might not be unreasonable or inequitable.' It is thus clear that the reason for the judicial outlawing of compound interest is based upon its being unduly oppressive and even ruinous to debtors, a criticism which does not lie against simple interest. The bondholders' claim in the instant case is only for simple interest upon a debt which has become due and is therefore not contrary to public policy."

Coming as it does shortly after the Sixth Circuit Court had declared that the public policy of the State of New York requires repudiation of a voluntary corporate undertaking to pay simple interest on overdue coupons, this decision by a New York judge is a significant reassertion of the true public policy in New York, completely in harmony with the declared policy of the Legislature to protect individuals against oppressive interest payments while requiring corporations to pay what they promise, even by implication.

CONCLUSION.

The judgments of the Circuit Court of Appeals, insofar as they reverse the judgment of the District Court, should be reversed with costs, and the judgment of the District Court should be affirmed with respect to the allowance of interest upon the interest coupons of the First Mortgage Bonds.

ROBERT J. BULKLEY,
Counsel for Petitioner.

RICHARD B. HAND,
Attorney for Petitioner.

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Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. ~~850, 851.~~ 44-45

In the Matter

of

VANHORN BONDHOLDERS PROTECTIVE COMMITTEE,

Petitioner,

—against—

LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these proceedings as the Green Committee and MORRIS GREEN, *et al.*,

Respondents.

BRIEF OF GREEN COMMITTEE AND MORRIS GREEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OSCAR S. ROSNER,
Counsel for Respondents,
Green Committee and Morris Green.

BAKER, OBERMEIER, ROSNER & ROSENSON,
Attorneys for Respondents,
Green Committee and Morris Green.

OSCAR S. ROSNER,
JAY RAYMOND LEVINSON,
Of Counsel.

THE COURT PRESS, N. Y. C.

Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. 850, 851.

In the Matter

of

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Petitioner,

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Respondents.

BRIEF OF GREEN COMMITTEE AND MORRIS GREEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Since the petitioner herein adopts all of the reasons and argument of the Vanston Committee petition (No. 848 and No. 849), the respondents herein beg leave to refer to their entire brief submitted in opposition to No. 848 and No. 849 as if same were herein repeated.

Respectfully submitted,

OSCAR S. ROSNER,
Counsel for Respondents,
Green Committee and Morris Green.

BAKER, OBERMEIER, ROSNER & ROSENSON,
Attorneys for Respondents,
Green Committee and Morris Green.

OSCAR S. ROSNER,
JAY RAYMOND LEVINSON,
Of Counsel.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 44, 45.

Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

In the Matter

of

AMERICAN FUEL & POWER COMPANY,
INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
Debtors.

VAN HORN BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

—against—

LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the GREEN COMMITTEE and MORRIS GREEN,
Respondents.

VAN HORN BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

—against—

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON and P. G. MEADOR,
Respondents.

BRIEF FOR RESPONDENTS GREEN COMMITTEE AND MORRIS GREEN.

OSCAR S. ROSNER,
Counsel for Respondents, Green Committee and Morris Green.

BAKER, OBERMEIER, ROSNER & ROSENSON,
Attorneys for Respondents, Green Committee and Morris Green.

OSCAR S. ROSNER,
Of Counsel.

JAY RAYMOND LEVINSON,
On the Brief.

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 44, 45.

In the Matter

of

AMERICAN FUEL & POWER COMPANY,
INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
Debtors.

VAN HORN BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

—against—

LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the GREEN COMMITTEE and MORRIS GREEN,
Respondents.

VAN HORN BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

—against—

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON and P. G. MEADOR,
Respondents.

BRIEF FOR RESPONDENTS GREEN COMMITTEE AND MORRIS GREEN.

The Respondents herein beg leave to refer to their brief in the companion case, Nos. 42 and 43, and respect-

fully request the Court to consider such brief as directed also to the instant case.

Respectfully submitted,

OSCAR S. ROSNER,
Counsel for Respondents,
Green Committee and Morris Green.

BAKER, OBERMEIER, ROSNER & ROSENSON,
Attorneys for Respondents,
Green Committee and Morris Green.

OSCAR S. ROSNER,
Of Counsel.

JAY RAYMOND LEVINSON,
On the Brief.

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 42
No. 43

IN THE MATTER
of
AMERICAN FUEL & POWER COMPANY, INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
Debtors.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,
against
LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the GREEN COMMITTEE and MORRIS GREEN,
Respondents.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,
against
CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON and P. G. MEADOR,
Respondents.

PETITION FOR REHEARING

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and GEORGE W. JAQUES,
Attorneys for Petitioner.

GEORGE W. JAQUES,
LEWRIGHT BROWNING,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1946

No. 42

No. 43

IN THE MATTER

of

AMERICAN FUEL & POWER COMPANY, INLAND GAS CORPORATION, KENTUCKY FUEL GAS CORPORATION,

Debtors.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,

Petitioner,

against

LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the GREEN COMMITTEE and MORRIS GREEN,

Respondents.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,

Petitioner,

against

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON and P. G. MEADOR,

Respondents.

PETITION FOR REHEARING

Petitioners respectfully suggest that the Court has overlooked certain basic facts, and that applying the principles stated in the opinion to those facts, a reversal of the judgment of the Circuit Court of Appeals is required.

1. Extent of the Lien

Initially, we point out the nature and extent of the mortgage lien of the Inland First Mortgage bondholders. The mortgage securing the Bonds was held to cover everything the corporation owns (Finding II and Conclusion of Law VI of the District Court, R. 193). Respondents objected to this holding and claimed on appeal that the mortgage did not cover (1) income earned before the filing of the mortgage foreclosure bill in the equity receivership, (2) cash on hand at the time of the appointment of the equity receiver on a creditor's bill and (3) after-acquired property. The Circuit Court of Appeals held against Respondents on all these points. (R. 229-234), 151 F. (2d) 470, 480-483 (1945).

Petitioners seek to enforce their contractual right to interest on interest coupons only out of the mortgaged property. A bondholder "may look to his lien not only for the principal but also for interest accruing up to the date of payment, though his debtor has gone into bankruptcy (*Coder* v. *Arts*, 213 U. S. 223, 245, affirming, 152 Fed. 943, 950) or into equity receivership (*American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261), and though interest will be denied the unsecured creditors if the assets are insufficient to pay all claims in full". *Ticonic Bank* v. *Sprague*, 303 U. S. 406, 413 (1938). As the quotation by the Court from *Group of Investors* v. *Milwaukee*, 318 U. S. 523, 573 (1943), shows, it is only in those instances in which the secured property is less than the amount of the secured creditor's total claim that interest above the amount of the security is disallowed. See also *Sexton* v. *Dreyfus*, 219 U. S. 339 (1911).

2. The Equities

Only on the assumption that the mortgage does not cover all the debtor's assets do we, as the Court states, "make a balance of equities between creditor and creditor or between creditors and the debtor". Balancing these equities

we find the scales weigh heavily in petitioner's favor. Over a number of years subsequent to 1930 the interest requirements on the bonds were not earned, but from about 1936 on, with some ups and downs, there was a marked improvement in gross earnings. (R. 73, 75, 77, 79, 81, 82, 83.) When in 1943 the instant question arose on an application for a distribution, the balance sheet showed a decided change obviously due to the production and sale since 1930 of the mortgaged gas. Current assets there appear at about $2,800,000 (R. 168-169). We believe the Court need only assume what is the fact, but not of record, that with existing business conditions the average earnings since 1943 have continued at not less than the rate of the latest three years shown in the record, *i. e.* roughly $370,000 per year, in order to come to the conclusion that there are now assets sufficient, if its decision stands, to make a payment on the stock of the Debtor.*

---

* The record (paragraph Sixth of the Application for distribution, R. 167) shows that the rejected claims of Columbia Gas & Electric Corporation, of about $2,160,000 principal amount are included in the balance sheet liabilities (R. 169), and this rejection has been upheld on appeal. *Columbia Gas & Electric Corporation* v. *U. S.*, et al., 151 F. (2d) 461 (1945) certiorari denied, 67 S. Ct. 48 (1946). If the claims of Columbia, including interest, computed by the Trustee at $3,514,847.48 on June 30, 1943, are eliminated the earned surplus item $6,654,586.38 (a red ink figure R. 169) is decreased to $3,139,738.90. If capital stock shown on the same page at $2,126,587 is deducted from this latter amount we have a red surplus figure of $1,013,151.90.

The average earnings for 1941, 1942 and 1943 are roughly $370,000 a year (see "net income" items, R. 82, 83, 84, after adding thereto unpaid interest on funded debt). Assuming this rate continued through 1944-1946 the Company is now $1,100,000 better off, and this amount wipes out the above red surplus figure of $1,013,151.90 and leaves something for the stock. Actually in 1944 the net income before interest on funded debt was approximately $517,000; in 1945 approximately $475,000 and for the first half of 1946 approximately $280,000. The Trustee advises net income for 1946 will exceed that for the year 1944, making an aggregate for the three years of approximately $1,500,000.

If it be claimed that the fixed capital is a wasting asset with little future return, we call attention to the fact that in the period 1941-1943 depreciation, depletion and amortization averaged

In the early stages of the proceedings there was little if anything out of which interest could be paid on the bonds, and nothing was paid them, but instead, at their expense, the avails of the property were plowed back and were used to build up a very satisfactory financial position for the estate. This increase in the earnings and assets points up the inequity of disallowing interest on interest coupons to the unjust enrichment of junior creditors and stockholders.

The basic rationale of the Court's opinion is that it is inequitable for one class of creditors to gain an advantage or suffer a loss *vis-a-vis* another class from the delay which is the inevitable result of the preservation of the debtor's estate for the benefit of all interests. See *Sexton* v. *Dreyfus, supra*, 346; *American Iron Co.* v. *Seaboard Air Line*, 233 U. S. 261, 266 (1914). Thus claims of various classes are retained in the same proportion as at the time of the filing of the petition, as if "the whole matter could be settled in a day by a pie-powder court." *Sexton* v. *Dreyfus, supra*, 344-345; *Ticonic Bank* v. *Sprague, supra*, 411. Should over the years the estate diminish or remain static the senior class may well benefit disproportionately to the junior classes if interest be paid. On the other hand quite the opposite result follows in a case such as this where the estate has increased. This is the holding of Mr. Justice Holmes in *Sexton* v. *Dreyfus, supra*. In allowing earnings after the date of the petition to be applied to interest accruing after such date, he stated: "There is no more reason for allowing the bankrupt estate to profit by the delay beyond the day of settlement than

---

$208,813.69 a year (R. 82-84) and the balance sheet as of June 30, 1943 (R. 168-9) shows the gas plant, after depreciation, depletion and amortization, to have a value of approximately $2,900,000. It should be noted that the amount of depreciation, depletion and amortization for the years 1931-1940, averages $236,278.51 (R. 73, 75, 77, 79, 81) which would indicate, what is the fact but not of record, *i. e.*, the acquisition of new gas reserves by the Trustee at a low figure and the abandonment of useless reserves carried at a high figure, all pointing to a favorable future for the properties.

there is for letting the creditors do so". Here the junior creditors and the stockholders profit from the inevitable delay which is no fault of the senior creditors,* and the senior creditors are subjected to a grievous loss. Had they obtained their share of the assets, that is, one hundred per cent, as of the inception of the proceedings, the entire increase in value of the estate would have accrued to them outside bankruptcy. To deny them a part of this increase in the form of interest on interest coupons is to place upon them the entire risk of a diminution of assets with no compensating advantage and is an inducement to junior creditors to delay winding up.

The ordinary conception of interest as compensation for the use of money (see *Ticonic Bank* v. *Sprague, supra,* 411; *Old Colony R. Co.* v. *Comm'r,* 284 U. S. 552, 560 (1932); *Deputy* v. *DuPont,* 308 U. S. 488, 498 (1940); *Equitable Society* v. *Comm'r,* 321 U. S. 560, 564 (1944); *John Kelley Co.* v. *Comm'r,* 326 U. S. 521, 530 (1946)), is an expression of the above principles. Basically in the business world interest presupposes that the money loaned will be used to profit and advantage and that therefore compensation should be paid for its use. Only when no profits are made by the borrower does interest resemble in any way a penalty. That is not this case. Here the debtor's estate has made extraordinary profits.

Under the carefully drawn and, as the Court assumes, valid covenant (R. 203-4) the interest in question should be given that "absolute priority" over stockholders it would have if the question had arisen on the approval of a plan of reorganization. *Consolidated Rock Co.* v. *DuBois,* 312 U. S.

---

* That the delay in this case has been inevitable and no fault of the First Mortgage bondholders is apparent from the reported cases. Claims amounting to many millions of dollars have been denied preference and the Columbia claims have been eliminated. *In re Inland Gas Corporation,* 91 F. (2d) 113 (1937); *Hamilton Gas Co.* v. *Inland Gas Corporation,* 102 F. (2d) 131 (1939); *In re American Fuel & Power Co.,* 122 F. (2d) 223 (1941); *Columbia Gas & Electric Corporation* v. *United States,* 151 F. (2d) 461 (1945).

510, 527-8 (1941); *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 116-7 (1939).

Furthermore, we believe a coupon is uniformly considered a negotiable instrument and, in a sense, a special type of interest which ordinarily can be sued on separately, and, when judgment is obtained, interest accrues from the due date of the coupon. Cf. New York Code of Civil Procedure, Section 480. *Central National Bank* v. *Bateman & Co. Inc.*, 15 Del. Ch. 31, 131 Atl. 202 (1925); *Bowman* v. *Neeley*, 137 Ill. 433, 27 N. E. 758 (1891); 151 Ill. 37, 37 N. E. 840 (1894); *Abbott* v. *Stone*, 172 Ill. 634, 50 N. E. 328 (1898); *Kentucky Title Company* v. *English*, 20 Ky. L. Rep. 2024, 50 S. W. 968 (1899); *Pensacola & A. R. Co.* v. *Hilton's Trustee*, 147 Ky. 553, 144 S. W. 1077 (1912).

We believe the facts of record indicate that the overwhelming balance of equities is in favor of petitioners. The full record in this insolvency further emphasizes that balance. We respectfully suggest that if the Court does not desire to grant a rehearing, then in the interests of a fully informed judgment, *Consolidated Rock Company* v. *DuBois, supra*, 520, the case be remanded to the District Court for a complete hearing on the equities.

December 31, 1946.

Respectfully submitted,

GEORGE W. JAQUES,
Counsel for Petitioners,
Vanston Bondholders
Protective Committee.

Certificate of Counsel

I, GEORGE W. JAQUES, attorney and counsel herein for the Vanston Bondholders Protective Committee, do hereby certify pursuant to Rule 33 that the foregoing Petition for rehearing is presented in good faith and not for delay.

December 31, 1946.

(S) George W. Jaques

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 42, 43.

In the Matter
of
AMERICAN FUEL & POWER COMPANY,
INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
Debtors.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,
—against—
LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the GREEN COMMITTEE and MORRIS GREEN,
Respondents.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,
—against—
CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON and P. G. MEADOR,
Respondents.

BRIEF FOR RESPONDENTS, GREEN COMMITTEE AND MORRIS GREEN, IN OPPOSITION TO PETITION FOR REHEARING.

OSCAR S. ROSNER,
Counsel for Respondents, Green Committee and Morris Green.

BAKER, OBERMEIER, ROSNER & ROSENSON,
Attorneys for Respondents, Green Committee and Morris Green.

OSCAR S. ROSNER,
Of Counsel.

JAY RAYMOND LEVINSON,
On the Brief.

THE COURT PRESS, N. Y. C.

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 42, 43.

In the Matter
of
AMERICAN FUEL & POWER COMPANY,
INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
Debtors.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,
—against—
LOUIS A. GREEN and ROBERT HEILBRUNN, Known in these Proceedings as the GREEN COMMITTEE and MORRIS GREEN,
Respondents.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,
—against—
CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON and P. G. MEADOR,
Respondents.

BRIEF FOR RESPONDENTS, GREEN COMMITTEE AND MORRIS GREEN, IN OPPOSITION TO PETITION FOR REHEARING.

Petitioners seek a rehearing upon the basis of a purported showing that if this Court's decision stands, there are now assets sufficient "to make a payment on the stock of the Debtor" (Petition for Rehearing, p. 3). While we do not subscribe to any such conclusion, it is most significant to note that the Petitioners have not attempted to gainsay the observation of Mr. Justice Black, in the opinion of the Court, that "Should interest on interest be paid, however, sub-

ordinate creditors would receive a greatly reduced share in the reorganized corporation."

Since the Petitioners have assumed to offer recent figures which do not appear in the record, we may be justified in beginning our analysis by quoting from the latest statement made by the Trustee in a petition filed by him in the District Court on December 3, 1946:

> "If interest on the over-due coupons on said First Mortgage bonds should be allowed, such interest would amount to $1,304,237.06 as of September 30, 1946."

The Petitioners cite a red surplus of $1,013,151.90 as at December 31, 1943 and then proceed to apply against it an aggregate of "net income before interest on funded debt" of approximately $1,500,000.00 for the years 1944 through 1946. But they overlook the fact that no provision has been made for contingent income taxes (possibly amounting to $300,000.00) probably due from the Trustee on the taxable income earned by the Debtor. And certainly interest on the funded debt is a deduction which must be taken into consideration. For the three years in question, simple interest (6½%) on the unpaid balance of principal due on the first mortgage bonds amounts to approximately $260,000.00; on the 7% debentures, approximately $220,000.00; and on the second mortgage 6% notes, approximately $72,000.00. Thus, the total of income taxes and interest on funded debt amounts to approximately $850,000.00, which should be deducted from the figure of $1,500,000.00, leaving an actual net income for the three years of approximately $648,000.00.

At best, then, the red surplus of $1,013,151.90 might be reduced to a red surplus of $365,151.00 as a result

of the operations of the past three years. Adding the "interest on interest" sought by the first mortgage bondholders would serve to increase the indicated red surplus to $1,669,388.00.

Hence, even if the Petitioners' approach to the problem from the viewpoint of the equities were presumed to be a correct one (which we doubt), still the figures supplied to this Court do not show, as contended by the Petitioners, that there are now assets sufficient to make a payment on the stock of the Debtor.

Moreover, as we read the opinion of the Court delivered by Mr. Justice Black, the salient factor is that "In this case where by order of the court interest was left unpaid, we do not think that imposition of interest on that unpaid interest can be justified by 'an application of equitable principles.'" Nowhere in this statement of principle can we find any warrant for indulging in a minute dissection of figures as has been done in the Petition for Rehearing.

Accordingly, we respectfully urge that the Petition for Rehearing be denied.

Respectfully submitted,

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OSCAR S. ROSNER,
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JAY RAYMOND LEVINSON,
On the Brief.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 44.

No. 45.

IN THE MATTER OF

AMERICAN FUEL & POWER COMPANY, INLAND GAS CORPORATION, KENTUCKY FUEL GAS CORPORATION, *Debtors.*

VAN HORN BONDHOLDERS PROTECTIVE COMMITTEE, *Petitioner,*

v.

LOUIS A. GREEN AND ROBERT HEILBRUNN, KNOWN IN THESE PROCEEDINGS AS THE GREEN COMMITTEE AND MORRIS GREEN, *Respondents.*

VAN HORN BONDHOLDERS PROTECTIVE COMMITTEE, *Petitioner,*

v.

CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON AND P. G. MEADOR, *Respondents.*

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

A rehearing of these cases is respectfully sought by Van Horn Bondholders Protective Committee because affirmance of the orders of the United States Circuit Court of Appeals for the Sixth Circuit will not accomplish the equitable distribution of assets of the bankrupt estate which is required

by the opinion of this Court, but, on the contrary, will defeat equity.

Certiorari was granted because of the importance of the questions raised, and this Court rejected the reasoning of the Circuit Court of Appeals, adopting an approach to the problem which was not suggested by counsel in brief or in oral argument, and was not considered by the District Court nor by the Circuit Court. This petitioner unreservedly accepts and adopts the principles expressed in this Court's opinion, but represents that the broad question of balancing creditors' equities was so submerged in the argument under a technical discussion of conflicts of laws, that it was not adequately presented to this Court, and a rehearing is now necessary to assure just application of the declared controlling principles to the facts of this situation.

The opinion of this Court recognized that the general rule stopping the accrual of interest at the beginning of bankruptcy proceedings is modified by equities running in favor of secured creditors under certain circumstances, and that "the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor."

As against a static bankrupt estate comprising a fixed property to be distributed among creditors it may well be that, during a delay deemed necessary to the administration of the estate, interest should not accrue to a preferred creditor at the cost of depriving a junior creditor of any part of his just claim. That is not this case.

This case is the converse. Inland is not a static estate, but an active one, and has produced good profits under the administration of the Court. A prompt liquidation at the time that Inland went into receivership would probably have paid nothing to junior creditors, as there were no unmortgaged assets. But the Court undertook the operation of the bankrupt estate, and, although the whole property was under the first mortgage, withheld from the bondhold-

ers accruing earnings which might have been applied to paying bond interest. With these funds so borrowed from the bondholders, the court's trustee acquired additional property, enlarged the bankrupt's facilities and earning capacity, and prospered increasingly.

It is agreed that bondholders should not profit at the expense of junior creditors by a delay ordered by a bankruptcy court in the settlement of a static estate. But in this case of an active estate profitably administered, we seek the chance to establish the equity that profits flowing from the use of the mortgaged property should be available to pay the bondholders an honest return for the use of the property under their mortgage and on the funds withheld from them to initiate and sustain the profitable operation. In equity a static estate should not be depleted to pay interest at the cost of junior creditors, but the working profits of mortgaged property should not enrich junior creditors and stockholders at the cost of using bondholders' capital without compensation.

The first mortgage bondholders have been compelled to forego the use of money which they had a right to get by the terms of the indenture. Solely by the use of the mortgaged property and its avails the trustee has accumulated enough to pay the bondholders in full, including interest on interest as the indenture provides, and also to pay the full face amount of the second mortgage securities.[1] Is it equity to abstract from the earnings of the mortgaged estate available funds which the indenture promised to these first mortgage investors, and ultimately divert them to payment of interest on the second mortgage? And shall we so pay to the second mortgage investors principal in full plus interest in full plus interest on unpaid interest instalments,

[1] All the accumulations of earnings were made possible by use of mortgaged property and its avails. That such accumulations have proven sufficient to pay indebtedness to the extent stated is due to the subordination of substantial claims of Columbia Gas & Electric Company, a controversy not directly involved here.

which is provided for also in the second mortgage indenture?

If payment of interest on interest is denied to the first mortgage there will probably be enough to pay interest on interest on the second mortgage. Although that seems inequitable it might result from an affirmance of the Circuit Court of Appeals. In the alternative, if second mortgage interest on interest is denied, there may well be funds remaining for the unjust enrichment of the holding company which owns the common stock of the debtor, at the cost of both first and second mortgage security holders. Or there might be a payment on the Columbia Gas & Electric claims, which the courts have subordinated because Columbia acquired them in violation of the Federal Antitrust Laws for the purpose of stifling the threatened competition of Inland. (*Columbia Gas & Electric Corp.* v. *United States, et al.*, 151 F. (2) 461, cert. denied October 14, 1946.)

The undersigned counsel ask this rehearing with humility, conceding that the record here may be inadequate to determine all the equities among creditors. Our apology is that we brought up to this Court a record covering the issues made by our opponents on their appeal from the District Court. The record even as it is, while it may not reveal the whole equity involved, is fully adequate to show the inequity which will result from a simple affirmance of the Circuit Court of Appeals.

In these cases the District Court and the Circuit Court of Appeals both assumed that the result must depend upon the validity under the New York law of a covenant to pay interest on matured interest coupons. This Court granted certiorari to establish the rule that a distribution by a bankruptcy court should be governed by the broader equities inherent in the policy of the Bankruptcy Act. Manifestly there has been no adequate argument of the equities here involved. A reargument will enable this Court to decide whether the required "balance of equities" can be better determined by this Court on this record, or by remand for further proceedings in the District Court.

CERTIFICATE.

We, the undersigned attorneys for the petitioner above named, certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

ROBERT J. BULKLEY,
HERBERT G. PILLEN,
Attorneys for Petitioner.

Of Counsel:
RICHARD B. HAND,

January 3, 1947.

Frankfurter J. p. 1

SUPREME COURT OF THE UNITED STATES

Nos. 42, 43, 44, and 45.—October Term, 1946.

Vanston Bondholders Protective Committee, Petitioner,

42 v.

Louis A. Green and Robert Heilbrunn, Known in These Proceedings as the Green Committee and Morris Green.

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45 v.

Carl B. Early, Daniel Matthews, Thomas Matthews, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 9, 1946.]

Mr. Justice Black delivered the opinion of the Court.

December 2, 1930, a Kentucky District Court appointed an equity receiver of Inland Gas Corporation to take complete and exclusive control, possession, and custody of all of Inland's properties, and enjoined Inland's officers from

paying its debts. At that time there was no interest unpaid on Inland's first mortgage bonds. February 1, 1931, semiannual interest coupons fell due on these bonds. The debtor could not pay; the court did not direct the receiver to pay. The indenture trustee, acting under the terms of the indenture, promptly declared the entire principal due and payable despite the previous assumption of custody of the estate by the federal court. In 1935, the same District Court approved a creditor's petition for reorganization under § 77B of the Bankruptcy Act, and at a subsequent date the reorganization was continued as a Chapter X proceeding.[1] The indenture provides for payment of interest on unpaid interest. Inland is insolvent, but its assets are sufficient to pay the first mortgage bondholders in full, including the interest on interest. Should interest on interest be paid, however, subordinate creditors would receive a greatly reduced share in the reorganized corporation. These latter concede that the first mortgage bondholders should receive simple interest on the principal due them, but challenge their right to be paid interest on interest[2] which fell due after the court took charge of Inland, and which interest the Court, out of consideration for orderly and fair administration of the estate, directed the receiver not to pay on the due date. It is this controversy which we must determine.

The first mortgage indenture document was written and signed in New York, designated a New York bank as trustee, and provided for payment of the bonds and attached interest coupons at the office of the trustee in New York, or at the option of the bearer, at a bank in Chicago, Illinois.

[1] Section 77B was enacted June 7, 1934, 48 Stat. 912. The § 77B petition in this case was filed while the estate continued in the equity receivership. Section 77B was superseded by Chapter X, 52 Stat. 883, 11 U. S. C. § 501 *et seq.* Section 276 of Chapter X, 11 U. S. C. 676, authorized continuance of the § 77B proceedings under Chapter X. See *Young* v. *Higbee Co.*, 324 U. S. 204, 205, n. 1.

[2] The claims for interest on interest amount to some $500,000.

A group of investment bankers underwrote the issue, sold the bonds to the public, and received a percentage of the proceeds and additional compensation for their services. Inland was organized under the corporation laws of Delaware. Its principal place of business was in Kentucky, and the property mortgaged was located in that state.

Under these circumstances the District Court was of the opinion that it must allow the claim for interest on interest if the indenture covenant was valid; that its validity must be determined by the law of New York, because the indenture was signed and the bonds were payable there; and that the covenant was valid there. Accordingly, the first mortgage bondholders were held entitled to interest on interest. Holding that New York prohibited covenants for payment of interest on interest, the Circuit Court of Appeals reversed. 151 F. 2d 470. We granted certiorari because of the importance of the questions raised.

The Circuit Court of Appeals thought the bankruptcy court must allow or disallow the claim for interest on interest according to whether the covenant to pay it was valid or invalid as between the parties to that covenant. It considered the covenant invalid and therefore unenforceable in bankruptcy upon two alternative assumptions. First, it assumed that a controlling federal rule required the bankruptcy court to determine validity or invalidity of the contract by looking to the law of New York, the state where the court found that the contract was "made" and primarily payable.[3] Second, since the bankruptcy

[3] The Circuit Court of Appeals thought a reference to New York law was authorized by the following cases: *Cromwell* v. *County of Sac*, 96 U. S. 51; *Scudder* v. *National Bank*, 91 U. S. 406, 412; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 453. None of these cases nor any cited by petitioner here, e. g., *Seeman* v. *Philadelphia Warehouse Co.*, 274 U. S. 403, involve questions of distribution of a debtor's assets in receivership, bankruptcy or reorganization to meet claims for interest on interest said to have accrued after a court took possession of a debtor's estate.

court was sitting in Kentucky, it should determine validity of the covenant as would a Kentucky court. Reviewing Kentucky decisions, the Circuit Court of Appeals concluded that Kentucky courts also would apply New York substantive law. Arriving at New York law by both hypotheses, the Circuit Court of Appeals interpreted that law as rendering the covenant invalid. We agree with the conclusion of the Circuit Court of Appeals that the claim for interest on interest should not be permitted to share in the debtor's assets, but disagree with the reasons given for that conclusion.

A purpose of bankruptcy is so to administer an estate as to bring about a ratable distribution of assets among the bankrupt's creditors. What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed is a question which, in the absence of overruling federal law, is to be determined by reference to state law.[4] *Bryant* v. *Swofford Bros.*, 214 U. S. 279, 290–291; *Security Mortgage Co.* v. *Powers*, 278 U. S. 149, 153–154. But obligations, such as the one here for interest, often have significant contacts in many states so that the question of which particular state's law should measure the obligation seldom lends itself to simple solution. In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states. Certainly the part of this transaction which touched New York, namely, that the indenture contract was written, signed, and payable

[4] Of course, there might be instances where the validity of the obligation would be determined by reference to the law of some foreign country.

there, may be a reason why that state's law should govern. But apparently the bonds were sold to people all over the nation. And Kentucky's interest in having its own laws govern the obligation cannot be minimized. For the property mortgaged was there; the company's business was chiefly there; its products were widely distributed there; and the prices paid by Kentuckians for those products would depend, at least to some extent, on the stability of the company as affected by the carrying charges on its debts. But we need not decide which, if either, of these two states' laws govern the creation and subsistence and validity of the obligation for interest on interest here involved. For assuming, *arguendo*, that the obligation for interest on interest is valid under the law of New York, Kentucky, and the other states having some interest in the indenture transaction, we would still have to decide whether allowance of the claim would be compatible with the policy of the Bankruptcy Act. *Cf. Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 451.

In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. *Erie R. R.* v. *Tompkins*, 304 U. S. 64, has no such implication. That case decided that a federal district court acquiring jurisdiction because of diversity of citizenship should adjudicate controversies as if it were only another state court. See *Holmberg* v. *Ambrecht*, 327 U. S. 392. But bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles.[5] And we think an allowance of interest on interest under the circumstances shown by this case would not be in

[5] *Heiser* v. *Woodruff*, — U. S. —, —; *American Surety Co.* v. *Sampsell*, 327 U. S. 269, 272; *Pepper* v. *Litton*, 308 U. S. 295, 303–306.

accord with the equitable principles governing bankruptcy distributions.

When and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by federal law. *Cf. Board of Comm'rs of Jackson County* v. *United States*, 308 U. S. 343; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289. The general rule in bankruptcy and in equity receivership has been that interest on the debtors' obligations ceases to accrue at the beginning of proceedings. Exaction of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment—a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved. Thus this Court has said: "We cannot agree that a penalty in the name of interest should be inflicted upon the owners of the mortgage lien for resisting claims which we have disallowed. As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate." *Thomas* v. *Western Car Co.*, 149 U. S. 95, 116–117. *Cf. American Iron Co.* v. *Seaboard Air Line*, 233 U. S. 261. Courts have felt that it would be inequitable for anyone to gain an advantage or suffer a loss because of such delay. *Sexton* v. *Dreyfus*, 219 U. S. 339, 346. Accrual of simple interest on unsecured claims in bankruptcy was prohibited in order that the administrative inconvenience of continuous recomputation of interest causing recomputation of claims could be avoided. Moreover, different creditors whose claims bore diverse interest rates or

were paid by the bankruptcy court on different dates would suffer neither gain nor loss caused solely by delay.[6]

Simple interest on secured claims accruing after the petition was filed was denied unless the security was worth more than the sum of principal and interest due. *Sexton* v. *Dreyfus*, *supra*. To allow a secured creditor interest where his security was worth less than the value of his debt was thought to be inequitable to unsecured creditors. Thus we recently said: "Since the distribution provided for these bonds on the basis of their mortgage securities is less than the principal amount of their claim, the limitation of their right to share the unmortgaged assets ratably with the unsecured creditors on the basis of principal and interest prior to bankruptcy only is justified under the rule of *Ticonic National Bank* v. *Sprague*, 303 U. S. 406." *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 573. But where an estate was ample to pay all creditors and to pay interest even after the petition was filed, equitable considerations were invoked to permit payment of this additional interest to the secured creditor rather than to the debtor. *Coder* v. *Arts*, 213 U. S. 223, 245; *Sexton* v. *Dreyfus*, *supra*. See also *Johnson* v. *Norris*, 190 F. 459.[7]

It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor. See *Sexton* v. *Dreyfus*, *supra*, at 346. That the proceeding before us have moved from equity receivership through § 77B to

[6] See § 63a (1) of the Bankruptcy Act, 11 U. S. C. 103a (1); *cf.* § 63 of the Act of 1898, 30 Stat. 562 and § 19 of the Bankruptcy Act of 1867, 14 Stat. 525. For a discussion of interest claims in bankruptcy see 3 COLLIER ON BANKRUPTCY (14th Ed.) 281, 1835.

[7] Analogous principles have been applied to the liquidation of national banks. *White* v. *Knox*, 111 U. S. 784, 786–87, relied on in *Sexton* v. *Dreyfus*, *supra*, 346; *Ticonic Nat'l. Bank* v. *Sprague*, 303 U. S. 406, 412–13.

Chapter X in the wake of statutory change does not make these equitable considerations here inapplicable. A Chapter X or § 77B reorganization court is just as much a court of equity as were its statutory and chancery antecedents. See *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, 527.[8]

In this case where by order of the court interest was left unpaid, we do not think that imposition of interest on that unpaid interest can be justified by "an application of equitable principles." See *Dayton* v. *Stannard*, 241 U. S. 588, 590.[9] Prior to the beginning of the equity receivership, Inland would have never owed interest on interest unless and until it had breached its obligation to pay simple interest promptly—on the date it was due. Before the receivership began a failure by Inland to pay coupons on the date they were due might have breached an existing obligation. This breach would have imposed upon Inland, under the terms of the covenant, a duty to pay interest on the interest it had failed to pay.[10] But when the equity receivership intervened, these interrelated obligations were drastically changed. The obligation to make prompt

[8] Section 115 of Chapter X; 11 U. S. C. 515 authorizes a Chapter X court to exercise "all powers, not inconsistent with this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor. . . ." Former § 77B of the Bankrutcy Act, 48 Stat. 912 and § 77 (a), 11 U. S. C. § 205 (a) (Railroad Reorganization) contain similar provisions.

[9] Petitioner and the Circuit Court have cited non-bankruptcy cases which award interest on interest to support the award in this reorganization. *Town of Genoa* v. *Woodruff*, 92 U. S. 502; *Edwards* v. *Bates County*, 163 U. S. 269. Diversity of citizenship brought these cases to the federal courts. None of them presented to the courts the special bankruptcy problems of uniformity, ratable distribution and fairness and equity which grow out of the context of the bankruptcy law.

[10] Had a breach occurred and a suit been filed in state court prior to receivership or bankruptcy, that court would have been required to determine whether the covenant was valid under the controlling state law.

payment of simple interest coupons was suspended. In fact, both Inland and the receiver were ordered by the court not to pay the coupons on the dates they were, on their face, supposed to have been paid. The contingency which might have created a present obligation to pay interest on interest—*i. e.*, a free decision by the debtor that it would not or could not pay simple interest promptly—was prohibited from occurring by order of the court. That order issued for a good cause, we may assume: to preserve and protect the debtor's estate pending a ratable distribution among all the creditors according to their interests as of the date the receivership began. The extra interest covenant may be deemed added compensation for the creditor or, what is more likely, something like a penalty to induce prompt payment of simple interest. In either event, first mortgage bondholders would have been enriched and subordinate creditors would have suffered a corresponding loss, because of a failure to pay when payment had been prohibited by a court order entered for the joint benefit of debtor, creditors, and the public. Such a result is not consistent with equitable principles. For legal suspension of an obligation to pay is an adequate reason why no added compensation or penalty should be enforced for failure to pay.

Affirmed.

MR. JUSTICE REED took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

Nos. 42, 43, 44 and 45.—October Term, 1946.

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On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 9, 1946.]

Mr. Justice Frankfurter, with whom Mr. Justice Jackson joins, concurring; Mr. Justice Burton having concurred in the opinion of the Court also joins in ~~their~~ this opinion.

In 1928 the Inland Gas Corporation, chartered by Delaware, floated a first mortgage bond issue covering property

located in Kentucky where it had its principal place of business. The mortgage indenture was executed in New York, designated a New York corporation as trustee, and made the bonds and coupons payable in New York, or, at the option of the holder, in Chicago where the debtor had a paying agent. By an explicit clause in the indenture the debtor agreed to pay interest on defaulted coupons at the rate which applied to the bonds themselves before maturity. The bonds were sold to the public in many States.

The debtor defaulted on coupons and also on the bonds when they became due. Reorganization proceedings under § 77 of the Bankruptcy Act were begun by creditors in the District Court for the Eastern District of Kentucky. Subsequently Chapter X of that Act was made applicable. In these proceedings a claim, based on the covenant in the indenture, was made by mortgage bondholders for interest on the defaulted interest coupons. The bankruptcy court allowed the claim, apparently because it concluded that the covenant is valid by the law of New York. The Circuit Court of Appeals for the Sixth Circuit reversed. 151 F. 2d 470. That court, apparently deeming itself ultimately controlled by the local law of Kentucky which, in turn, looked to the law of New York, ruled that the claims should have been disallowed because the contract for the payment of interest on coupons was void under New York law. On the other hand, the Securities and Exchange Commission, a statutory party to the proceedings (§ 208 of the Bankruptcy Act, 11 U. S. C. 608), urges allowance of the claim if the covenant would, apart from bankruptcy, be upheld in the courts of any State "having a substantial relationship to the transaction". The Commission therefore supports allowance of the claim because it finds that two of the States related to the transaction would uphold the covenant: Delaware, the State of

the debtor's incorporation, and Kentucky, its principal place of business and the site of the mortgage property. Finally another view suggests that whether interest should be allowed in this case is a matter of federal law to be fashioned by the bankruptcy court in the light of general, undefined notions of equity policy and of bankruptcy administration.

Of course, where rights are created by the Constitution, treaties or statutes of the United States and do not owe their origin to the laws of any State, the granting or withholding of interest as part of the remedy is also a function of federal law. That is the upshot of the decision in *Board of Commissioners* v. *United States*, 308 U. S. 343. The factors legally decisive of the present problem are the opposite of those which controlled our decision in that case. There we had a right created by federal law. In this case, it was beyond the power of federal law to create the right for which claim was made, although, if by State law such a right came into being, it might become a question whether the federal courts should recognize such a right when they are sought to be utilized as instruments for its enforcement.

Conflict-of-law problems have a beguiling tendency to be made even more complicated than they are. Therefore, they are often, as now, fitting occasions for observing the classic admonition to begin at the beginning. The business of bankruptcy administration is to determine how existing debts should be satisfied out of the bankrupt's estate so as to deal fairly with the various creditors. The existence of a debt between the parties to an alleged creditor-debtor relation is independent of bankruptcy and precedes it. Parties are in a bankruptcy court with their rights and duties already established, except insofar as they subsequently arise during the course of bankruptcy administration or as part of its conduct. Obligations to be satisfied out of the bankrupt's estate thus arise, if at all,

out of tort or contract or other relationship created under applicable law. And the law that fixes legal consequences to transactions is the law of the several States. Except for the very limited obligations created by Congress, *e. g.*, *Holmberg* v. *Armbrecht*, 327 U. S. 392, a debt is not brought into being by federal law. Obligations exist or do not exist by force of State law though federal bankruptcy legislation is in force, just as State law determined whether they came into being or did not come into being between 1878 and 1898 when there was no bankruptcy law. The fact that subsequent to the creation of a debt a party comes into a bankruptcy court has no relevance to the rules concerning the creation of the obligation. Of course a State may affix to a transaction an obligation which the courts of other States or the federal courts need not enforce because of overriding considerations of policy. And so, in the proper adjustment of the rights of creditors and the desire to rehabilitate the debtor, Congress under its bankruptcy power may authorize its courts to refuse to allow existing debts to be proven. It may do so, for instance, where the recognition of such claims would undermine the fair administration of a debtor's estate, even though before bankruptcy such a claim would have supported a valid judgment in the courts of the State which created the obligation, or even in the courts of the State where the bankruptcy court is sitting. But the threshold question for the allowance of a claim is whether a claim exists. And clarity of analysis justifies repetition that except where federal law, wholly apart from bankruptcy, has created obligations by the exercise of power granted to the federal government, a claim implies the existence of an obligation created by State law. If there was no valid claim before bankruptcy, there is no claim for a bankruptcy court either to recognize or to reject.

Such an analysis, however phrased, is indispensable to the solution of the problem now before us. Putting the

wrong questions is not likely to beget right answers even in law. One way of putting our problem is to ask whether the bankruptcy court executing the policy of Congress could recognize a claim for interest on coupons and allow it to share in the distribution of the bankrupt's assets. But thus to frame the question is to avoid the crucial preliminary inquiry whether any obligation exists to be recognized. For nothing comes into a bankruptcy court to which congressional policy can apply unless it is an obligation created by applicable State law. And no obligation finds its way into a bankruptcy court unless by the law of the State where the acts constituting a transaction occur, the legal consequence of such a transaction is an obligation to pay. See *Bryant* v. *Swofford Bros.*, 214 U. S. 279, 290–91; *Benedict* v. *Ratner*, 268 U. S. 353; *Security Mortgage Co.* v. *Powers*, 278 U. S. 149. Where a transaction in its entirety occurs in one State it is clearly the law of that State that determines if an obligation is born, whether the question becomes relevant in a bankruptcy court or in any other court. But the mere fact that an agreement is made in one State by citizens of a second State for performance in a third and affecting individuals in all forty-eight States does not change the principle inherent in our federal scheme, that the existence of a debt comes about not by federal law but by force of some State law, even though the right to enforce the debt, if it exists, may raise federal questions if bankruptcy ensues. Bankruptcy legislation is superimposed upon rights and obligations created by the laws of the States. Compare *Marshall* v. *New York*, 254 U. S. 380. We do not reach considerations of policy in bankruptcy administration until there are rights, created by applicable local law, to be recognized.

This brings us to the immediate situation. This is not a case where damages are claimed in the form of interest, for the detention of monies due. In such a situation the

right to interest and its measure become matters for judicial determination. The claim here asserted is based solely on the terms of the agreement. The covenant for interest on interest was entered into by the parties in New York. The dominant place of performance was also New York. In the circumstances, if the words of the indenture created an obligation, they did so only if the law of New York says they did. Williston, Contracts § 1792. If New York outlawed such a covenant, neither Kentucky nor Delaware nor the States in which bonds were sold or where bondholders reside could give effect to an obligation which never came into being. Compare *John Hancock Ins. Co.* v. *Yates*, 299 U. S. 178. And the ultimate voice of New York law, the New York Court of Appeals, speaking through Judge Cardozo, stated it as settled law that "a promise to pay interest upon interest is void . . .". *Newburger-Morris Co.* v. *Talcott*, 219 N. Y. 505, 510. This view of the New York law is supported by the great weight of Judge Mack's authority. *American Brake Shoe and Foundry Co.* v. *Interborough Rapid Transit Co.*, 11 F. Supp. 418, 419–420. But see *American Brake Shoe and Foundry Co.* v. *Interborough Rapid Transit Co.*, 26 F. Supp. 954, *contra*. However, it is not for us to ascertain independently whether the law of New York deemed a nullity the agreement that was here sought to be made the basis of a claim. We would not have brought the case here on that issue. The Circuit Court of Appeals made such an investigation and concluded that in New York the undertaking to pay interest was void. We accept this finding and conclude that since no obligation was created there was no claim provable in bankruptcy. And so we are not now called upon to decide whether as a matter of bankruptcy administration an agreement to pay interest on interest, where it is an obligation enforceable by State law, is enforceable in bankruptcy. That is a

question that can arise only where such an obligation arose under State law. The opposite is the assumption in the case before us.

It is argued however, that this conclusion subjects the fate of a claim in bankruptcy to the whim of State law. We are told that this result is against the policy of Congress implied in measures for the protection of investors and contravenes the requirement of "uniform Laws on the subject of Bankruptcies." Art. I, § 8, Cl. 4. But this misconceives the purpose and settled understanding of the bankruptcy clause of the Constitution. The Constitutional requirement of uniformity is a requirement of geographic uniformity. It is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country regardless of the State in which the bankruptcy court sits. See *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 190. To establish uniform laws of bankruptcy does not mean wiping out the differences among the forty-eight States in their laws governing commercial transactions. The Constitution did not intend that transactions that have different legal consequences because they took place in different States shall come out with the same result because they passed through a bankruptcy court. In the absence of bankruptcy such differences are the familiar results of a federal system having forty-eight diverse codes of local law. These differences inherent in our federal scheme the day before a bankruptcy are not wiped out or transmuted the day after.